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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 291

EQUITABLE LIFE INSURANCE COMPANY OF IOWA,
Petitioner,

vs.

HALSEY, STUART & CO., a corporation,
Respondent.

BRIEF OF RESPONDENT

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SUPPLEMENTAL STATEMENT OF THE CASE

While petitioner's statement of the case, subject to certain inaccuracies which will be pointed out, accords generally with the record, it omits many facts which are material to a correct understanding of the issues. The court below having decided the case solely on the insufficiency of the evidence to sustain the charges of fraud, a summarization of these omitted facts is important.

The Long-Bell Lumber Company, one of the largest producers of lumber in the country, anticipating the early exhaustion of its timber supply in the South, purchased in 1919 and 1921 large tracts of timber in the Pacific Northwest, first in Oregon and then in Washington. This vast timber tract was about thirty miles from the Columbia River midway between Portland and the Pacific Ocean (Tr. 353).

To provide for the construction of the large lumber mills necessary for the conversion of this timber into lumber products and the housing of its thousands of prospective em-

ployees, the Company acquired in 1922 about 11,000 acres of land in Cowlitz County, Washington, at the junction of the Cowlitz and Columbia Rivers (Tr. 345). Since the land adjacent to the Columbia and Cowlitz Rivers was subject to periodic overflow, it was necessary to construct extensive dikes to protect the land. This work was done by The Long-Bell Lumber Company or one of its subsidiaries and, after completion, the cost of the work was funded through the organization of a diking district under the laws of the State of Washington, which district issued its bonds and delivered the same to The Long-Bell Lumber Company (Tr. 19, 113-14, 117, Deft's Exs. 35A-H, Plff's Ex. 25).

Upon a part (about 3,000 acres, Tr. 345) of the land thus made available for development, The Long-Bell Lumber Company laid out the model city of Longview, Washington (Plff's Ex. B28 certified to this Court). In 1922 and the years immediately following, extensive public improvements were undertaken, including public buildings and parks, paved streets, sidewalks and a comprehensive sewer system (Plff's Exs. B25, B28 and B31 certified to this Court). To carry on this work and take over such improvements as had already been constructed by the Lumber Company or its subsidiaries, local improvement districts were organized under the Washington Local Improvement Act. In all, twenty-three such districts were organized, two of which, Nos. 11 and 19, covered the entire City of Longview, the others covering only parts thereof (Tr. 78, 118-19, Plff's Ex. B25).

These districts severally issued their special assessment bonds, due on or before twelve years from date, for the cost of the work. The bonds and interest thereon were payable out of taxes collected through special assessments levied by the districts against the lands within each district benefited by the local improvements (Plff's Ex. B1, Tr.

410). As the work was completed the bonds of the several districts were issued to the contractors who constructed the improvements, or to The Long-Bell Lumber Company where it had performed the work. Ultimately, all of the bonds of Districts Nos. 1 to 20, inclusive, came into the hands of the Lumber Company (Tr. 118-21).

In the summer of 1925 The Long-Bell Lumber Company approached respondent, which had already marketed several large timber bond issues for the Company, with respect to the purchase of some of these special assessment bonds. Respondent insisted that the bonds be unconditionally guaranteed as to both principal and interest by The Long-Bell Lumber Company (Tr. 74, 82, 120, Plff's Ex. P34). This was done, and in October, 1925 respondent offered to its customers $1,483,000 of Longview Local Improvement Districts Bonds. The offering circular discloses that no attempt was made to segregate the bonds of the various districts or to show what lands were included therein or the value thereof (Tr. 74, 80, 414-17). A general description of the development at Longview and a condensed balance sheet of The Long-Bell Lumber Company for the year 1924 were included in the circular. Subsequently, in June, 1926, respondent offered $908,699.57 of bonds of Longview Local Improvement District No. 11, issued in payment of the sewer system installed by one of the Long-Bell subsidiaries, This issue was advertised by a similar bond circular. The third and last issue, offered in March, 1927, was of $785,734.60 of Longview Improvement Districts Bonds of unidentified districts, and the offering circular contained the same general description of "Longview" and a consolidated balance sheet as of December 31, 1926, of The Long-Bell Lumber Corporation, the holding company which owned 99% of the capital stock of The Long-Bell Lumber Company and its subsidiaries (Tr. 410-13).

The information as to Longview embodied in the three circulars, and the balance sheet figures, were all obtained by respondent from The Long-Bell Lumber Company (Tr. 337-40). In fact, the descriptive matter about Longview contained in the last circular, which is the one on which petitioner claims to have relied, was dictated by the advertising manager for The Long-Bell Lumber Company, and incorporated practically word for word in the bond circular (Tr. 339, 615). The circulars were likewise submitted to Mr. Jesse Andrews, general counsel for the Lumber Company (Tr. 356), who was very familiar with the situation at Longview and who read the statement in the circulars under the caption "Longview" and approved the statement as both proper and accurate (Tr. 356).

As appears from the large map of Longview certified up to this Court (Plff's Ex. P33), an industrial area was laid out between the city limits of Longview and the Columbia River and the plants of the Long-Bell and Weyerhaeuser companies, and some of the other industrial plants subsequently built, are located in this industrial district. The port of Longview, providing access to the river and the public docks, is within the city limits. These facts as to the technical city limits of Longview were not known to Mr. Simond, who prepared the offering circulars, or to any of the other employees or officers of respondent until October of 1930, when information on that subject was obtained at petitioner's request (Tr. 340). Respondent relied entirely upon The Long-Bell Lumber Company, which had laid out the city and constructed it, for the physical facts as to the City of Longview (Tr. 340). Each circular before it was released was submitted to and approved by Long-Bell officials (Tr. 338).

All three issues of bonds were extensively advertised by respondent and were all sold to its customers (Tr. 84).

The last bond of the third and last issue was sold early in 1928 (Tr. 84, 340). At or about the time that respondent acquired its first block of Longview Local Improvement Districts Bonds, it also purchased from The Long-Bell Lumber Company the entire issue of Consolidated Diking District Bonds of a par value of $3,260,000, which were likewise guaranteed as to both principal and interest by The Long-Bell Lumber Company (Tr. 117). These bonds were sold publicly in 1925 by respondent and were widely advertised by circulars and in leading metropolitan papers (Tr. 345, 376). Most of the City of Longview was within the limits of the Diking District, which, however, extended far beyond the city limits, embracing much of the land in the valley between the Columbia and Cowlitz Rivers (Tr. 264).

In the carrying on of its general business as investment banker, respondent maintained a trading department through which it purchased bonds from its customers and others, which bonds it, in turn, resold (Tr. 99). Each week the trading department prepared a printed list of bonds on hand available for sale, referred to as "Bonds on Hand List", which it furnished to its several branch offices and salesmen. This list was supplemented by daily advices indicating the bonds still available for sale (Tr. 296).

The Bonds on Hand List for May 3, 1930 (Plff's Ex. 19, Tr. 574) disclosed $85,000 of Longview Local Improvement Districts Bonds of various districts on hand available for sale, which respondent had acquired in small lots through the ordinary trading operations of the firm (Tr. 373-4, Deft's Ex. 36, Tr. 617). Mr. Kelley was respondent's representative at Des Moines, Iowa, and periodically called on Mr. Hubbell, petitioner's Vice-President in charge of bond purchases. Shortly after the receipt of this list, Kelley called Mr. Hubbell's attention to these $85,000 of Improvement Districts Bonds. Mr. Hubbell was an experienced

bond buyer. He had been active in the purchasing of securities for the Equitable Life for some twenty years (Tr. 185) and had already purchased from the respondent, through Mr. Kelley, over $1,000,000 of municipal and utility bonds (Tr. 305-6, 612). In 1930, the Insurance Company held in its portfolio over $21,000,000 of bonds, of which over $13,000,000 par value were municipal bonds of various types (Deft's Ex. 1 certified to this Court). As appears from this exhibit, petitioner was buying "high rate municipals", including a large number of special assessment bonds of cities, districts and other municipal bodies.

Mr. Hubbell expressed an interest in the bonds and asked for additional information. Specifically, he requested the annual report of The Long-Bell Lumber Company for the year ended December 31, 1929 (Tr. 297, 315-16), a statement as to the amount of bonds of each issue that had been retired, some information as to the local improvement district laws of the State of Washington, and information covering the City of Longview in a general way (Tr. 296-97). None of this information was in Kelley's possession. He had never sold Longview Improvement Districts Bonds before and his sole knowledge of the issue was confined to the information contained in the original offering circular. He accordingly asked his home office to supply the requested data (Tr. 297, 314).

Everything which Mr. Hubbell requested was furnished to him by Kelley. About May 8, 1930, Kelley turned over a memorandum showing the total amount of each Longview improvement district issue, the amount of bonds called to date, and the last numbers called (Plff's Ex. B-23, Tr. 465). A few days later, on May 14, 1930, he turned over to Mr. Hubbell a digest of the Washington local improvement district laws (Deft's Ex. 2), a printed copy of the annual report of The Long-Bell Lumber Corporation and subsidiaries

for the year ended December 31, 1929 (Plff's Ex. B-34, Tr. 468), and a large package of documents which Mr. Wood, the sales manager for respondent in charge of the Iowa district, had taken directly from the buying file of the Chicago office of respondent and which contained the various showings which respondent had obtained from The Long-Bell Lumber Company in connection with its original purchase of the Improvement Districts Bonds (Tr. 341). This envelope contained Plff's Exs. B-25-32, inclusive, and are all certified to this Court for inspection. The more important of the documents so taken from respondent's buying file and delivered to the petitioner are referred to in petitioner's statement of the case. In describing Exhibit B-25 (Pet. Brief, p. 4) and the map appearing on the last page of this exhibit, petitioner fails to quote the entire legend indicating what this map discloses. The legend reads as follows:

> "A general layout of the entire Longview development, including the manufacturing plants of The Long-Bell Lumber Company. This layout is intended to show in a general way the relation of the various parts of the city site to each other and location of the city in relation to water, railroad and highway transportation facilities."

In short, this legend clearly indicates that the map is not a map purporting to show merely the City of Longview but the entire Longview development, including the industrial area.

Petitioner's Exhibit B-27 is an advertisement published by The Long-Bell Lumber Company in the Saturday Evening Post as a part of its national advertising program, and Exhibit B-28 a descriptive circular put out by the Chamber of Commerce of the City of Longview.

On the 14th of May, 1930, after all of the foregoing data had been submitted to Mr. Hubbell, he requested Kelley to

have respondent write a formal offering letter which he could submit to the Finance Committee of the Insurance Company. This was in accordance with the usual practice followed by Kelley and Hubbell in connection with all substantial purchases of securities (Tr. 299). It was in this connection that the letter (Plff's Ex. B-24, Tr. 466), a portion of which is quoted in petitioner's statement of facts was written. The "data covering this issue", to which Mr. Wood refers in his letter, was all of the material which he had sent to Mr. Kelley for transmission to Mr. Hubbell, including the package containing the buying file of Halsey, Stuart & Co. (Tr. 332). Wood did not, so he testifies, consciously withhold from the Equitable Life any information in his possession relative to the Longview Local Improvement Districts Bonds or The Long-Bell Lumber Company (Tr. 332).

Mr. Hubbell stated that he was well aware before he purchased any Longview Local Improvement Districts Bonds that these bonds were not funded obligations of the City of Longview, but were issued by separate improvement districts and secured by a tax lien upon the property within those districts (Tr. 193). It was testified by all of the witnesses familiar with the purchase and sale of municipal securities, including Mr. Hubbell (Tr. 186-87), that it was not the practice prior to 1932 or 1933 for investment houses, when purchasing municipal bonds, or for investors when buying such bonds, to make any inquiry as to overlapping municipal issues; that is, the existence of outstanding bond issues of other municipal bodies whose territory might overlap the territory of the particular municipality whose bonds were the subject of purchase or sale (Tr. 332-33). Mr. Hubbell also knew, before he purchased a single Longview Improvement Districts Bond, of the existence of Consolidated Diking District No. 1, of the amount of such bonds that were

then outstanding, of the purpose for which these bonds had been issued, and of the fact that they were secured by assessments payable in installments over a period of twelve years made by the Diking District against the land comprised within that district, and that the bonds were unconditionally guaranteed as to both principal and interest by The Long-Bell Lumber Company. All of these facts were disclosed in the audited statement of The Long-Bell Lumber Company and subsidiaries for the year ended 1929 (Pltff's Ex. B-34, Tr. 468-78).

From time to time during the summer and fall of 1930, as the respondent acquired additional Improvement Districts Bonds in its trading operations, these bonds appeared on its salesmen's Bonds on Hand Lists, and Kelley submitted such additional lots to Mr. Hubbell for consideration. Neither Mr. Kelley nor Mr. Hubbell recall any particular conversations relating to these purchases (Tr. 194, 320) until October of 1930, when a substantial block of improvement bonds of District No. 11 were available for sale and were submitted to Mr. Hubbell. At that time Mr. Hubbell inquired for the first time whether District No. 11 was coextensive with the city limits of Longview and whether the Long-Bell mills were located within the corporate limits of the city (Tr. 302). Mr. Kelley called for this information from the home office and Mr. Simond, of respondent's buying department, sent a wire to Longview requesting this information (Tr. 342). The reply from Mr. Hay of The Long-Bell Lumber Company was read to Mr. Kelley over the telephone (Tr. 327-8) and he, in turn, conveyed the information to Mr. Hubbell before the transaction for the purchase of these bonds was approved by the Finance Committee of the Equitable on October 17 (Tr. 538). The answers to Mr. Hubbell's questions were that District No. 11 was approximately coterminous with the corporate limits

of the City of Longview and that neither the Long-Bell nor the Weyerhaeuser mills were located within the corporate limits of the city (Tr. 302). Mr. Hubbell testified that Kelley always furnished him with all information which he requested and that he cannot recall anything that he asked for in the way of information, either from Halsey, Stuart & Co., Longview or The Long-Bell Lumber Company, which Kelley did not get for him (Tr. 197).

Petitioner purchased from respondent, during the period from May 17, 1930, to February 26, 1931, a total of $353,000 of Longview Improvement Districts Bonds distributed among nine different districts (Tr. 617). At the time petitioner instituted its suit this amount had been reduced to $308,000 through the payment and retirement of bonds by the several districts (Tr. 10). At the time of the trial petitioner's holdings had been further reduced through bond retirements to $266,000 (Tr. 617). Up to the time of trial petitioner had received by way of interest on the Longview bonds which it had purchased from respondent a total of $130,337.34. Contrary to the assertion in petitioner's statement of facts (p. 13) that the Lumber Company defaulted in 1931 in the payment of local improvement assessments on practically all of the improved lots and lands in the various local improvement districts, the facts are that sufficient collections of assessments were made by the several districts so that, at the time of trial, interest coupons falling due in 1936 and, in some cases, in 1937 and 1938 had been paid in full (Tr. 623).

The bonds which respondent sold to petitioner were bought on the market from investors, financial institutions and dealers (Tr. 619) during the period from October 9, 1929, to December 8, 1930, at prices only a point or two below the prices at which the bonds were resold to petitioner, except with respect to one lot of bonds purchased on

October 9, 1930, where, due to special circumstances (Tr. 287-8), respondent was able to purchase bonds at 89 (Tr. 617). During the year 1930 respondent bought for its own account a total of $495,000 of Longview Districts Bonds and resold a total of $516,000. Moreover, respondent continued to buy these bonds well into 1931, using its own money and buying them for its own account (Tr. 100, 619).

In May of 1931 Mr. Hubbell sent his assistant, James Windsor, to the West Coast to investigate various securities held by petitioner in that territory (Tr. 199). Mr. Windsor spent some time at Longview, Washington, and under date of June 3, 1931, submitted a written report to petitioner. This report makes only the most casual reference to the Long-Bell and Weyerhaeuser mills, using the following language:

> "While neither the Long-Bell or Weyerhaeuser mills or any of their important subsidiaries are within the city limits, it is true that almost all of their employees live here and buy here" (Tr. 539).

He concluded his report with the observation that if "the slump ends and lumber booms we have a good investment", but if "the depression lasts for another year and lumber stays sour and Long-Bell gets into deeper water, we have a decided risk here". Following the receipt of this report, Mr. Hubbell from time to time requested respondent to furnish him with additional information regarding the local improvement districts (Tr. 308). Every request so made was complied with by respondent. If the information was not available at its Chicago office, letters were written to Long-Bell officials at Longview and copies transmitted to Mr. Hubbell (Tr. 200). Mr. Hubbell admits that by the middle of 1931 he was fully advised as to all the facts as to Longview and The Long-Bell Lumber Company, which the complaint alleges the respondent fraudu-

lently and maliciously concealed prior to the sale of the bonds (Tr. 201).

The statement in petitioner's brief (p. 14) that petitioner made complaint to Kelley in the Summer or Fall of 1931 that it had been imposed upon in the transaction does not accurately state Mr. Hubbell's testimony. When pressed as to what he had said to Kelley on this subject, Mr. Hubbell admitted that he could not recall what he had said and could not recall ever having said to Kelley or any representative of respondent that respondent had defrauded the petitioner (Tr. 201). Kelley testified that no complaint was ever made by Mr. Hubbell to him at any time that any facts had been misrepresented or concealed by respondent in the sale of the Longview Local Improvement Districts Bonds (Tr. 308-9). In any event, after Mr. Hubbell states that he was fully advised as to all of the facts now alleged to have been misrepresented or concealed, he continued to buy bonds from respondent. During 1931 Kelley sold the petitioner, through Mr. Hubbell, $1,561,000 of bonds of various issues, during 1932 $201,000, during 1933 $104,000, and in March, 1934 $50,000, or a total of approximately $2,000,000 (Tr. 305-6, Deft's Ex. 26, Tr. 612). In November, 1931 Mr. Windsor submitted a written report to Mr. Hubbell in which Mr. Windsor stated that he had made a careful check of the correspondence and offering sheets of respondent in regard to the Local Improvement District Bonds, and that such check "fails to disclose any misstatements on their part" (Plff's Ex. B-56, Tr. 493). No letters were ever written by petitioner to respondent complaining or even intimating that any misstatements had been made or that any material facts had not been disclosed in connection with the sale of these bonds until August, 1934, shortly prior to the institution of this suit, when a letter was written by counsel for the petitioner outlining its claim (Tr. 379-80).

At the beginning of the year 1930 The Long-Bell Lumber Company had assets in excess of $100,000,000, with $50,000,000 in surplus. The year 1929 had been a fairly prosperous year. The Company looked forward to an improvement in business for 1930, despite the market break in the Fall of 1929 (Tr. 347-8). The financial officers of the Company in 1930 made a forecast of earnings through the year 1931 which showed that, with no improvement in business, the Company could go through the year without increasing its bank borrowings, paying all obligations as they matured (Tr. 352).

For some years The Long-Bell Lumber Company had had a $9,000,000 line of credit with various banks throughout the country. When the officers of the Company made their annual trip in the Spring of 1930 to visit the commercial banks, one bank in St. Louis declined to renew its $500,000 line (Tr. 348). The suggestion was then made by one of the officers of the Chase National Bank in New York that, to avoid uncertainty as to the Company's future available credit, a wholly owned subsidiary corporation be formed to which the Company would convey certain of its unencumbered assets, which new company would assume the bank indebtedness and secure a binding agreement from all the banks to extend a definite line of credit for a definite period of time (Tr. 349). This suggestion was made in May, 1930, but was not given serious consideration by the officers of Long-Bell until the latter part of July (Tr. 349). About the middle of September, it was decided by Long-Bell officials that this was a desirable step for the Company to take, and a draft of a syndicate loan agreement was prepared (Tr. 350). Subsequently, in October or November, The Long-Bell Lumber Sales Corporation was organized.

Notice of the formation of the Sales Corporation and of the transfer of assets to it appeared in many papers

throughout the country and in lumber periodicals, and written notice was given to all creditors of the Lumber Company whose names appeared upon its books (Tr. 150, 367). The transaction was made effective as of November 1, 1930, although the actual transfers of property to the Sales Corporation were not made until December 9, 1930 (Tr. 350-1). In the judgment of the officers of The Long-Bell Lumber Company, the formation of the Sales Corporation and the assumption by it of the current liabilities of the Lumber Company, aggregating some $7,000,000, was a desirable thing to do and a step which would greatly strengthen the credit position of the Company (Tr. 350, 370).

However, the Long-Bell officials, like many other people, failed to appreciate the extent to which the depression would affect the lumber business. There was a continuous decline in price and volume of consumption of lumber beginning in 1930 and continuing through 1931 and 1932, in which year the production of lumber in the United States was less than in any year since 1860. The Company could not realize the cost of production from the price of the timber (Tr. 355-6).

So far as the officers of respondent were concerned, they had no part whatever in the formation of The Long-Bell Lumber Sales Corporation. Mr. Stuart, the President, has no recollection of having had any conversation regarding the proposed organization of the Sales Corporation with Long-Bell officials before the actual formation of the corporation (Tr. 95-6, 101, 103). Mr. Shrader, Vice-President of the respondent, first learned of the formation of the Sales Corporation after the consummation of the transaction in the Fall of 1930 (Tr. 168). Neither Mr. Stuart nor Mr. Shrader regarded the formation of the Sales Corporation as reflecting upon the financial integrity or solvency of The Long-Bell Lumber Company (Tr. 101,

167-8). Neither Mr. Stuart nor Mr. Shrader had anything whatever to do with the original purchase of Longview Local Improvement Districts Bonds or with the sales to the Equitable or other customers of the firm (Tr. 101, 156, 167).

The stock of The Long-Bell Lumber Corporation, the holding company, was listed on the New York Stock Exchange and consequently quarterly consolidated earnings statements were filed with the Exchange and made available to the public generally. The earnings reflected in these statements were reported in the financial journals and newspapers in Kansas City and elsewhere (Tr. 145, 355). These quarterly statements were likewise sent to respondent (Tr. 146). In a few instances it also received special cumulative earnings statements prepared by the Company's office, as for the three months ending March 30, 1930, four months ending April 30, 1930, and five months ending May 31, 1930 (Tr. 159). All of these statements for 1930 disclosed that The Long-Bell Lumber Company was losing money, although considering the size of the Company the losses were not great (Plff's Ex. 19-B, Tr. 449, Plff's Ex. B-20, Tr. 454, Plff's Ex. B-21, Tr. 458). The earnings of the Company for each quarterly period during 1930 were reported in at least three financial publications which were received by the Equitable Life Insurance Company at its home office in Des Moines—The Analyst, Barron's Weekly, and the Chicago Journal of Commerce (Tr. 203-4, Deft's Exs. 39-45, 49-50, certified to this Court).

None of the financial transactions of The Long-Bell Lumber Company during 1930, to which reference is made in petitioner's statement of the case, was regarded by the officers of respondent as anything more "than the efforts of a well managed company, in view of the conditions in 1930 and the then period of time, to put itself in a more

liquid position" (Tr. 100). The sale of the Longview, Portland & Northern Railroad Company, for which the contract was made in February, 1930, and which was consummated in November, 1931, was a most favorable sale in which the Lumber Company realized the full cost of the railroad (Tr. 353-4). The sale of the electric light plant in Longview in July of 1930 was likewise a sale for cash, in which The Long-Bell Lumber Company realized its full cost (Tr. 354). This was such a favorable transaction that Mr. Stuart wrote the Chairman of the Board of The Long-Bell Lumber Company a letter congratulating him on this advantageous sale (Plff's Ex. B-12, Tr. 441). Likewise, the efforts of The Long-Bell Lumber Company to increase its cash position by loans on the Longview Daily News (Tr. 164) and the timber contracts with Lamm and Kesterson were regarded by respondent's officers as a legitimate effort on the part of the Company to further increase its current cash position. As Mr. Shrader, Vice-President of respondent, testified, none of these transactions "then or at any time indicated to me in the slightest that the Long-Bell was in distress or financial peril or anything of that kind" (Tr. 167). "I had not the slightest doubt of the solvency and ultimate success of the Long-Bell at that time" (Tr. 166). As a result, respondent continued to purchase, with its own money and for its own account, not only the Longview Improvement Districts Bonds guaranteed by The Long-Bell Lumber Company but the first mortgage and other direct obligations of Long-Bell throughout 1930 and well into 1931 (Tr. 100).

In 1933, after The Long-Bell Lumber Company had been unable to meet the interest on its bonds and committees were being formed for the protection of its various classes of security holders, Mr. Hubbell had a number of conferences with Mr. MacNeille, Vice-President of respondent,

and with other representatives of holders of improvement districts and diking district bonds regarding the formation of committees to represent such bonds and various plans for the reorganization of The Long-Bell Lumber Company. Finally, in the summer of 1934, Mr. Hubbell went with Mr. MacNeille to Longview, Washington, and there conferred for several days with representatives of other interested groups (Tr. 378-9). Mr. Hubbell finally agreed to serve as one member of a committee representing improvement districts bonds (Tr. 379) and wrote Mr. MacNeille several letters approving a tentative plan to waive the guaranty of The Long-Bell Lumber Company on the improvement bonds and accept in lieu thereof the guaranty of one of the subsidiary real estate holding companies at Longview (Deft's Exs. 17 and 18, Tr. 570-3). At no time during these extended negotiations did Mr. Hubbell ever say to Mr. MacNeille that respondent had in any respect misrepresented the Longview bonds at the time of their sale to the petitioner or failed to disclose any facts regarding the condition of the Long-Bell Company (Tr. 379).

Late in August of 1934, after The Long-Bell Lumber Company had made application to the Federal Court at Kansas City for reorganization under Section 77B (Tr. 137), petitioner for the first time presented its claims against respondent (Tr. 379-80). The claim then made, and later confirmed in writing, was confined to two charges: (1) that the statements contained in the original offering circular (Plff's Ex. B-1, Tr. 411-12) that Longview had a frontage of 7¼ miles on the Columbia River and that "Because of its natural advantages and proximity to the timber stands of the Long-Bell and Weyerhaeuser interests, Longview was selected as the site of the vast lumber manufacturing plants of these companies" were false; and (2) that the statement in Mr. Wood's formal offering letter of May 14,

1930 (Plff's Ex. B-24, Tr. 466) to the effect that "this city has no funded debt, other than these Improvement Bonds" led the petitioner to believe that no assessment bonds of any other municipal body, such as the Consolidated Diking District, were outstanding, the assessments to pay which were spread against lands within the City of Longview (Tr. 381). No claim was made that respondent had concealed or failed to disclose any facts or circumstances regarding Longview or the financial condition of The Long-Bell Lumber Company (Tr. 379-80).

Some seven months later (Tr. 2), and approximately four years and eleven months after the alleged misrepresentations were made, this suit was filed. Eight months after this suit was brought, the Equitable Life Insurance Company was still carrying its Longview Local Improvement Districts Bonds on its books at 85% of their par value. The Equitable's 69th Annual Report to its policyholders for the year ending December 31, 1935, stated that all the Company's investments were carried at a conservative valuation and that the $272,000 par value of Longviews then held were worth $231,200 (Tr. 202, Deft's Ex. 8), although the complaint sworn to by Mr. Hubbell in *April, 1935* stated that the $308,000 of Longview Improvement Bonds then held by the Equitable were worth not to exceed the sum of $60,000 (Tr. 15-16, 202).

SUMMARY OF ARGUMENT

I.

Respondent does not contend, nor did the Circuit Court of Appeals find, that the so-called "hedge clause" in the original offering circular relieved respondent from liability for misrepresentations falsely or recklessly made. The court below properly found that the record was devoid of proof that respondent made the statements contained in the circular either with knowledge of their inaccuracy or recklessly.

A.

The proper function and scope of the "hedge clause" was to advise petitioner that the statements contained in the circular were not made by the respondent of its own knowledge, but were based upon information furnished by others and believed by respondent to be accurate. Such qualification was unnecessary as to Exhibits B-25, B-27 and B-28, which on their face disclosed that they were statements made by the Long-Bell Lumber Company, one of its subsidiaries, and The Longview Chamber of Commerce.

Readinger v. *Rorick*, 92 Fed. (2d) 140, 144 (Certiorari denied, 302 U. S. 758).

Southern Development Co. v. *Silva*, 125 U. S. 247, 257.

B.

The contention that the statement in the "hedge clause" that respondent relied upon the information contained in the circular in its purchase of the bonds is a misrepresentation, because respondent would not have bought the bonds but for the unconditional guaranty of Long-Bell, is patently unsound and an attempt to read into the language used a meaning not justified by the context.

C.

There is no basis on the record in this case for the contention that respondent made any statements regarding "Longview" as of its own knowledge or that it made such statements recklessly.

Distinguishing:

Hansen v. *Kline*, et al., 136 Ia. 101, 113 N. W. 504.

Davis v. *Central Land Co.*, 162 Ia. 269, 143 N. W. 1073.

Haigh v. *White Way Laundry Co.*, 164 Ia. 143, 145 N. W. 473.

Ultramares Corp. v. *Touche, Niven & Co.*, 255 N. Y. 170, 174 N. E. 441, 447.

II.

Fraud is never to be presumed. It must be affirmatively proved by such clear and convincing evidence as leaves the mind well satisfied that the charges are true. For this positive requirement of proof, petitioner asks this court to adopt the principle that fraud may be presumed when it appears that the one charged with fraud might have discovered the facts by pursuing a line of inquiry other than that which was followed.

Seymour v. *Chicago & Northwestern Ry. Co.*, 181 Ia. 218, 164 N. W. 352.

Dallas Real Estate Co. v. *Groves*, ... Ia. ....., 292 N. W. 152, 155.

Under Iowa law, the essential elements of an action for deceit are: That the representation was made, that it was false, known at the time to be false, made with intent to mislead plaintiff, relied upon by plaintiff to his damage, and no negligence in so relying:

Smith v. *Packard & Co.*, 152 Ia. 1, 130 N. W. 1076, 1077.

Kuehl v. *Parmenter*, 195 Ia. 497, 192 N. W. 429, 430.

Andrew v. *Darrow Trust, etc.*, 205 Ia. 244, 216 N. W. 551, 552.

Gray v. *Shell Pet. Corp.*, 212 Ia. 825, 237 N. W. 460, 463.

Gipp v. *Lynch*, 226 Ia, 1020, 285 N. W. 659, 662.

III.

The record contains no proof that respondent made any false statements or spoke any "half truths" regarding the financial condition of the Long-Bell Lumber Company. Petitioner's complaint is that respondent did not voluntarily disclose to petitioner every detail regarding Long-Bell's condition which came to respondent's knowledge during the year 1930. No such duty was imposed upon respondent under the Iowa law.

Gamet v. *Haas*, 165 Ia. 565, 146 N. W. 465-6.

Boileau v. *Records & Breen*, 165 Ia. 134, 144 N. W. 336, 338.

Sherman v. *Harbin*, 125 Ia. 174, 100 N. W. 629.

Magee v. *Manhattan Life Ins. Co.*, 92 U. S. 93, 99.

Foreman v. *Dugan*, 205 Ia. 929, 218 N. W. 912, 914.

Benedict v. *Hall*, 201 Ia. 488, 207 N. W. 606, 607.

Boyd v. *Miller*, 210 Ia. 829, 230 N. W. 851, 855.

Cleaveland v. *Richardson*, 132 U. S. 318, 329.

Distinguishing:

Noble v. *Renner*, 177 Ia. 509, 159 N. W. 214.

Tyler v. *Savage*, 143 U. S. 79, 97.

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383.

Laidlaw v. *Oregon*, 2 Wheat. 178.

McDonald v. *de Fremery*, 142 Pac. 73, 176 Pac. 38.

Downey v. *Finucane*, 205 N. Y. 271, 98 N. E. 391.

A.

Respondent, having furnished to petitioner the exact information regarding the Long-Bell Lumber Company which was requested, does not become guilty of fraudulent concealment by failing to voluntarily disclose subsequent financial transactions of Long-Bell. Especially is this so where, in the judgment of respondent's officers, there were no developments adversely affecting Long-Bell's guaranty of the Improvement Districts bonds or which caused respondent to cease the purchase of these bonds for its own account.

Distinguishing:

Noble v. *Renner*, 177 Ia. 509, 159 N. W. 214, 217.

Loewer v. *Harris*, 57 Fed. 368, 372.

IV.

Under Iowa law the rule of *caveat emptor* is applied whenever the parties are dealing at arm's length and there is no evidence of fraudulent concealment. In the instant case there was no evidence of false or equivocal statements made by respondent regarding Long-Bell's financial condition. The court, therefore, properly applied the Iowa law in holding that respondent was under no duty to voluntarily disclose facts coming to its knowledge.

Gamet v. *Haas*, 165 Ia. 565, 146 N. W. 465.

Wagner v. *Standard Seed Tester Co.*, 194 Ia. 1330, 191 N. W. 314, 315.

Distinguishing:

Foreman v. *Dugan*, 205 Ia. 929, 218 N. W. 912.

Noble v. *Renner*, 177 Ia. 509, 159 N. W. 214.

Iasigi v. *Brown*, 17 Howard 183.

Thermoid Rubber Co. v. *Bank of Greenwood*, 1 Fed. (2d) 891.

V.

The construction to be placed on an alleged written representation, as well as the materiality of such representation, are questions of law for the court. The Circuit Court of Appeals was right in the construction which it placed on Wood's letter of Ma[illegible] 14, 1930, and the undisputed proof shows that petitioner did not rely on the statement as a representation that there were no outstanding bonds of any other municipal body which were a charge upon lands within the several Improvement Districts.

Readinger v. *Rorick*, 92 Fed. (2d) 140, 144.

Baker v. *Mathew*, 137 Ia. 410, 115 N. W. 15, 19.

Rand v. *Michaud*, 122 Me. 65, 118 Atl. 893, 895.

Nat'l Bank of Pawnee v. *Hamilton*, 202 Ill. App. 516, 522-3.

Bower, Actionable Misrepresentation, Art. 31 and Commentary thereon in Sec. 4.

Hembey v. *Cornelius* (Ark.), 31 S. W. (2d) 539, 540.

VI.

The Circuit Court of Appeals did not decide that petitioner's negligence could be pleaded as a defense to fraudulent representations or affirmative concealment of material facts, nor was its decision based on that principle. The remarks of the court to which petitioner calls attention were incidental to its discussion of the total failure of the proof to establish fraudulent concealment.

VII.

The judgment of the Circuit Court of Appeals reversing and remanding the cause for a new trial is fully justified, not only because the proofs relied upon are insufficient to sustain the action, but also because of the trial court's errors in the admission of evidence and instructions to the jury and because of the total failure of proof as to the amount, if any, of the petitioner's damages. All of these questions were presented fully to the Circuit Court of Appeals.

U. S. v. *American Ry. Express Co.*, 265 U. S. 425, 435.

Morley Co. v. *Maryland Casualty Co.*, 300 U. S. 185, 191.

Stoke v. *Converse*, 153 Ia. 274, 133 N. W. 709, 711.

Kuehl v. *Parmenter*, 195 Ia. 497, 192 N. W. 429, 431.

Smith v. *Middle States Utilities Co.*, 224 Ia. 151, 275 N. W. 158, 162.

A.

Many of the Court's instructions, particularly those on the question of damages, were erroneous and highly prejudicial to respondent.

Otte v. *James,* 200 Ia. 1353, 206 N. W. 613.

Garvey v. *Chicago Rys. Co.,* 339 Ill. 276, 171 N. E. 271.

Benham v. *Heath,* 77 Ind. App. 91, 133 N. E. 179.

Gallagher v. *Singer Sewing Machine Co.,* 177 Ill. App. 198.

Waldman v. *Sanders Motor Co.,* 214 Ia. 1139, 243 N. W. 555, 560.

Smith v. *Middle States Utilities Co.,* 224 Ia. 151, 275 N. W. 158.

B.

The trial court erred in admitting evidence as to events and happenings long subsequent to 1930, and in no way shown to be the direct or proximate result of the alleged misrepresentations or concealments, for the purpose of establishing the value of Longview Local Improvement Districts bonds at the time of their purchase in 1930.

Baumchen v. *Donahoe,* 215 Ia. 512, 242 N. W. 533.

Carlson v. *Burg,* 137 Minn. 53, 162 N. W. 889.

O'Hara v. *Derschug,* 241 App. Div. 513, 272 N. Y. S. 189, 198.

David v. *Belmont,* 291 Mass. 450, 197 N. E. 83, 85.

Southern Bldg. & Loan Assoc. v. *Wales,* 224 Ala. 40, 138 So. 553, 555.

Southern Bldg. & Loan Assoc. v. *Bryant,* 225 Ala. 527, 144 So. 367, 368.

Danielson v. *Skidmore*, 125 Ark. 572, 189 S. W. 57, 58.

Munson v. *Fishburn*, 183 Cal. 206, 190 Pac. 808.

cf. *Healy* v. *Ginoff* (Mont.) 220 Pac. 539.

Singleton v. *Harriman*, 152 Misc. 323, 272 N. Y. S. 905, 906 (Aff'd 241 App. Div. 857, 271 N. Y. S. 996).

People v. *S. W. Straus & Co.*, 156 Misc. 642, 282 N. Y. S. 972, 980.

C.

There was no evidence before the jury from which it could possibly determine the amount of petitioner's damages, and the trial court erred, therefore, in not directing a verdict for the respondent.

Perry Fry Co. v. *Gould*, 214 Ia. 983, 241 N. W. 666, 669.

Doyle v. *Union Bank & Trust Co.*, 102 Mont. 563, 59 Pac. (2d) 1171, 1174.

Otte v. *James*, 200 Ia. 1353, 206 N. W. 613.

Harris v. *Shear* (Tex.) 177 S. W. 136, 137.

Kinnear v. *Prows*, 81 Utah 135, 16 Pac. (2d) 1094.

ARGUMENT

I.

Respondent does not contend, nor did the Circuit Court of Appeals find, that the so-called "hedge clause" in the original offering circular relieved respondent from liability for misrepresentations falsely or recklessly made. The court below properly found that the record was devoid of proof that respondent made the statements contained in the circular either with knowledge of their inaccuracy or recklessly.

We have no quarrel with the rules of law discussed by petitioner under Point I. Of course, a vendor of securities cannot make statements knowing the same to be false, or recklessly, without any effort to check their accuracy, and then seek protection under a hedge clause which advises the purchaser that the statements are based upon information which the seller regards as reliable. In the instant case, however, as the Court properly found, "there is no proof that appellant knew of the falsity of the statements" (Tr. 667). Nor is there the slightest evidence that respondent proceeded recklessly in the preparation of the circular. On the contrary, the most meticulous care was exercised to have each circular checked by Long-Bell officials and Long-Bell's general counsel.

When respondent's officer in charge of the preparation of bond circulars began the preparation of a circular for the first issue of Longview Local Improvement District Bonds, he naturally turned for a description of the Longview community to the most authoritative source of information of which he knew—The Long-Bell Lumber Company, which had founded, laid out and built the City of Longview. The data regarding Longview was obtained "from the Long-Bell Lumber Company, from their office

in Kansas City and from their office in Longview" (Tr. 337). After the preliminary circular for the first issue was prepared, it was submitted to the home office of The Long-Bell Lumber Company in Kansas City for approval and, after changes and corrections, the final draft was likewise submitted for Long-Bell's approval. The same process was followed with each of the other circulars describing Longview Local Improvement Districts Bonds. "No circulars were released until they had had the approval of the Long-Bell Lumber Company" (Tr. 338).

With respect to the circular, a copy of which was received by Mr. Hubbell prior to the purchase of any bonds (Plff's Ex. B-1, Tr. 410), the check was even more complete. The description of "Longview" contained in that circular was dictated by Mr. Kendall, in charge of the advertising department of Long-Bell (Deft's Exs. 33, 33A, Tr. 615) and incorporated almost word for word in the circular (Tr. 339). Kendall had been head of Long-Bell's advertising department for a number of years and had visited Longview prior to the date of the preparation of this circular. Mr. Jesse Andrews, of Baker, Botts, Andrews & Wharton, general counsel for Long-Bell, had participated very actively since 1918 in both the legal and business affairs of the Company (Tr. 346) and from 1923 to 1930 was frequently in Longview—in fact, almost every other month (Tr. 362). Mr. Andrews passed upon the statement in the circular under the caption "Longview" and regarded the statement as both proper and accurate (Tr. 356). The uncontradicted proof, therefore, establishes the care and diligence exercised by respondent to obtain from the most authoritative source an accurate description of "Longview". No court on this record could have found that any statement contained in this bond circular was recklessly made, and the talk in petitioner's brief about "reckless statements and

representations, without knowledge as to their truth or falsity" is without a shadow of support in the record.

Nor has the charge that respondent had actual knowledge that some of the statements in the circular were inaccurate any basis whatever in the evidence. Mr. Simond, who prepared the three offering circulars, had no knowledge that the information furnished to him by Long-Bell was not absolutely accurate until the 17th of October, 1930 (Tr. 340). On October 16, 1930, as the Court will recall, Mr. Simond sent a telegram to Mr. Hay, tax agent for the Long-Bell at Longview, Washington, requesting, among other things, information as to whether Long-Bell's mills were in District Eleven (Tr. 342, Deft's Ex. 22, Tr. 609). Mr. Hay replied that neither the Long-Bell nor Weyerhaeuser mills were within District Eleven or the city limits (Deft's Ex. 23, Tr. 609). This request emanated from the petitioner and the reply was relayed by Mr. Kelley on October 17, 1930, to petitioner's office (Tr. 342, 328, 303). The very fact that Simond sent this wire to Long-Bell requesting information as to the location of Long-Bell's mills is definite confirmation of his testimony that up to that time he had no information on that subject such as appeared in the offering circulars.

So far as Simond knew, no one connected with respondent had any other or different information than he did on the subject (Tr. 340). The record is barren of proof that knowledge as to the city limits of Longview or what, if any, industrial plants were within the city limits, was ever brought home to any representative of respondent prior to October 17. Counsel for petitioner do not contend otherwise, except as they argue that the presence of several of respondent's officers in Longview during the early days of the city's history gave them an opportunity to discover the facts. Mr.

MacNeille and Mr. Shrader, Vice Presidents of respondent, visited Longview during the period from 1922-24 in connection with the first mortgage on Long-Bell's timber lands and had nothing to do with either the sale or purchase of Improvement Districts bonds (Tr. 218-19, 167). Mr. Sheep long since deceased, was present when the first contract for the purchase of the Longview Local Improvement Districts Bonds was signed. The testimony of Mr. Morris, Vice President of Long-Bell, resident at Longview, clearly shows that neither the subjects of the city limits of Longview nor the location of the industrial plants with reference thereto were ever discussed with any of these gentlemen when they were at Longview (Tr. 218).

Moreover, there was no occasion for any of these officers of respondent to make inquiry upon a subject in which respondent then had no vital interest. Because the City of Longview was in its infancy and as yet undeveloped, the respondent purchased the bonds in reliance upon Long-Bell's unconditional guaranty (Tr. 81) and sold the bonds to its customers placing the emphasis squarely upon the guaranty and without a showing in the circular, which would otherwise have been made, as to land values, population and other pertinent data (Tr. 81). Certainly the fact that respondent might have discovered additional facts regarding Longview, had there been any occasion for it to make such further inquiry, cannot be substituted for clear and convincing proof that it did acquire such knowledge.

Counsel for petitioner further complain because respondent's counsel did not ask Mr. Shrader or Mr. MacNeille, when on the stand, what they knew about the city limits of Longview. Since neither of these gentlemen had anything whatever to do with the original purchase or subsequent sale of the Improvement bonds, such a question would naturally

not have been addressed to them. But, in any event, the burden rested on petitioner to establish its case. Petitioner called most of respondent's officers as its own witnesses and could have asked them these questions if deemed material. The duty did not devolve on respondent to prove a negative.

Under the well settled law of Iowa, scienter is an essential element of an action for deceit (This brief pp. 20-1, 41). We submit that the Circuit Court of Appeals, applying the Iowa law, could have reached no other conclusion than the one which it did reach, that "there is no proof that appellant knew of the falsity of the statements" (Tr. 667). What the court said about the effect of the "hedge clause" must be considered, therefore, in the light of what the court had already found to be the facts—that respondent did not knowingly or recklessly make any untrue statements in its circulars. The "hedge clause" performs, however, a perfectly proper and lawful function.

A.

The proper function and scope of the "hedge clause" was to advise petitioner that the statements contained in the circular were not made by respondent of its own knowledge, but were based upon information furnished by others and believed by respondent to be accurate. Such qualification was unnecessary as to Exhibits B-25, B-27 and B-28, which on their face disclosed that they were statements made by the Long-Bell Lumber Company, one of its subsidiaries and The Longview Chamber of Commerce.

Mr. Hubbell testified that he read all of the bond circular (Plff's Ex. B-1) and was aware of the fact that the statements contained therein were based upon information which respondent had obtained from others. Furthermore, as an experienced bond buyer, he said that he "knew that it was the practice, and of necessity so, of investment houses in securing information regarding the properties of a com-

pany upon which the securities were being issued, to secure that information from the issuing company" (Tr. 188). It must be obvious, therefore, that Mr. Hubbell did not rely on the description of "Longview" contained in the circular as a statement made or purported to be made by respondent of its own knowledge. He knew that the data was supplied by others and probably came from The Long-Bell Lumber Company or one of its subsidiaries.

The importance of the "hedge clause", therefore, is that it removes this case completely from that class of cases where a seller has been held liable for material statements which he purports to make as of his own knowledge, when in fact the information was obtained from others and subsequently proves to have been incorrect.

There was, of course, no need to advise Mr. Hubbell that the statements contained in the booklet issued by the Longview Company (B-25), in the copy of The Long-Bell Lumber Company's advertisement in the Saturday Evening Post (B-27) or in the descriptive booklet put out by the Longview Chamber of Commerce (B-28) were not statements made by respondent of its own knowledge. The documents spoke for themselves. They were, in fact, part of the very data upon which respondent relied in preparing some of the bond circulars (Tr. 338).

Moreover, having clearly told petitioner in the bond circular that the description of Longview was obtained by respondent from others and, while believed to be accurate, was not guaranteed, it would indeed be strange if petitioner could claim that the same information contained in advertising booklets obviously put out by others were nevertheless statements which petitioner had a right to believe were being made by respondent of its own knowledge.

A case similar in many respects on its facts to the instant case was decided in 1937 by the Circuit Court of Appeals

for the Sixth Circuit—*Readinger* v. *Rorick*, 92 Fed. (2d) 140 (certiorari denied, 302 U. S. 758). An action at law was brought against an investment house to recover the purchase price of securities sold to the plaintiff. The right of recovery was based on alleged false representations and concealment of facts inducing the purchase. Reliance was placed on statements made in the bond circular claimed to be misleading and inaccurate, among others the statement that the bonds were very well secured, yielding an exceedingly high tax free return. The Court considered this representation in connection with the "hedge clause" in the circular, which read:

> "The statements contained in this circular are based upon official and other information which we consider reliable but are not to be considered as representations or guarantees by us"—

and said, p. 144:

> "With reference to a somewhat similar clause, it was held in *Saupe* v. *St. Paul Trust Co.*, 170 Minn. 366, 212 N. W. 892, 893, that 'as a general rule, one who qualifies his representations by the use of language indicating that they are based on information and belief, and who honestly believes the representations to be true, is not guilty of actionable fraud, although in fact they proved to be untrue.' See, also, *Southern Development Co.* v. *Silva*, 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678. The evidence shows that this clause embraced no idle or reckless statement. It does not show by that clear, unequivocal, and convincing proof which is requisite (Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 S. Ct. 1015, 30 L. Ed. 949) that defendants believed it was untrue."

The language of the court in *Readinger* v. *Rorick*, *supra*, applies with even greater force to the case before this Court. The affirmative evidence of the respondent, uncontradicted by any evidence offered by petitioner, discloses that as re-

spects the statements in the circular there was no scienter, no intention to deceive, no knowledge by respondent of any inaccuracy in the statements from which scienter might be inferred, and certainly no reckless disregard by respondent as to their truth or falsity. This Court, in one of the decisions cited in the above quotation from *Readinger* v. *Rorick—Southern Development Co.* v. *Silva*, 125 U. S. 247, said (p. 257): "The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false"—yet that is precisely what petitioner is asking this Court to do.

B.

The contention that the statement in the "hedge clause" that respondent relied upon the information contained in the circular in its purchase of the bonds is a misrepresentation, because respondent would not have bought the bonds but for the unconditional guaranty of Long-Bell, is patently unsound and an attempt to read into the language used a meaning not justified by the context.

It is clear from a reading of the entire "hedge clause" (Tr. 413) that respondent states three things: (1) that the information set forth in the circular was obtained from outside sources, (2) that, while not guaranteed, respondent believes the statements to be reliable and accurate, and (3) that respondent has relied upon the truth and accuracy of these statements in buying the bonds. The sole purpose of the clause "We ourselves have relied upon them in the purchase of this security" is to give point and emphasis to respondent's statement that it believed the statements to be reliable. Petitioner seeks to read into the statement a meaning obviously not intended—that the reason, and the sole reason, which induced respondent to buy the bonds was the statement in the circular describing generally "Longview". Respondent was not purporting to state in the "hedge

clause'' the reasons which actuated it in purchasing the bonds but merely the fact that, when it bought the bonds, it relied upon the accuracy of the facts set forth in the circular.

Moreover, petitioner overlooks entirely the fact that the ''hedge clause'' qualifies the entire circular, which contains not only the general description of ''Longview'' but also statements that principal and interest were unconditionally guaranteed by Long-Bell, that the bonds were exempt from Federal income taxes, and a balance sheet of The Long-Bell Lumber Company and subsidiaries for the year ended December 31, 1926 (Tr. 411-13). Admittedly, all of these facts were of great importance and relied upon by respondent in purchasing the bonds. The statements in the ''hedge clause'', even if construed as petitioner seeks to construe them, were true and accurate. Respondent did rely on the facts set forth in the circular when it purchased the bonds.

As a matter of fact, respondent also relied in its original purchase on the assessments levied against lands in the several districts for the added value which that gave to the bonds (Tr. 82), but, because the City of Longview was only in the initial stages of development, would not have purchased the bonds or sold them to its customers without the unconditional guaranty of Long-Bell (Tr. 83).

We are not clear just what point petitioner seeks to make under subdivision I. B. of its brief (pp. 27-8). If it is now being suggested that the statements in the ''hedge clause'' constitute an additional affirmative misrepresentation upon which petitioner can rely, the complete answer to such suggestion is that petitioner's pleadings purport to allege specifically all of the claimed misrepresentations and fraudulent concealments relied upon (Tr. 16-36), and it is certainly too late in this Court to inject into the case a claimed misrepre-

sentation upon which an issue was not presented by the pleadings and which was never considered by the trial court or presented to the jury.

C.

There is no basis on the record in this case for the contention that respondent made any statements regarding "Longview" as of its own knowledge or that it made such statements recklessly.

We have already pointed out that the "hedge clause" clearly advised petitioner that the statements contained in the circular were not being made by respondent of its own knowledge. Mr. Hubbell, petitioner's Vice President, not only read the "hedge clause" but frankly admits that he understood its purpose and effect (Tr. 188). The same statements, in substance, that appear in the circulars were contained in the advertising matter put out by The Long-Bell Lumber Company, The Longview Company and the Longview Chamber of Commerce. By no stretch of the imagination could Mr. Hubbell have understood these to be statements made by respondent of its own knowledge and certainly not when Hubbell was told by the "hedge clause" that the same statements in the circular were made upon information received from others and believed to be reliable. There is no denial of any of these facts. There was, therefore, no issue to submit to the jury as to whether the description of "Longview" was stated by respondent as of its own knowledge. The uncontradicted facts show that it did not do so.

It is likewise true that there was no issue to go to a jury as to whether or not respondent made the statements concerning "Longview" recklessly and without exercising due care. Even assuming that such an issue was presented by the pleadings (which it was not; Tr. 16-36) and assuming that negligent misrepresentation is actionable under the

law of Iowa (which it is not; this Brief, pp. 20-1, 41), the meticulous care exercised by respondent in checking the accuracy of its circulars with Long-Bell officials and general counsel effectively disposes of the charge that it made any statement in the circulars recklessly. We have already commented upon these facts. They stand uncontradicted in the record.

The Iowa cases, cited by petitioner, therefore, have no application whatever to the facts in the instant case. They were all actions in which the defendants were charged with making some affirmative statement of fact as of their own knowledge, which later proved to be false and misleading.

In *Hansen* v. *Kline, et al.*, 136 Ia. 101, 113 N. W. 504, the evidence of the plaintiff disclosed that the defendants both represented that the farm in question was good farm land; level, partly fenced and improved with a small house, barn and windmills, and worth $1,900. One defendant advised the plaintiff that he need not go and see the farm "because what I say you can believe". The other defendant stated "he knew it was good land just like he said". All of the statements regarding the farm were substantially untrue and, while defendants had never seen the farm and so advised plaintiff, it does not appear that they had any information in their possession which justified the representations which they made so definitely and positively. The Court very properly said in the course of its opinion that the defendants, having positively asserted that they had information concerning the farm when in fact they had no such information, were guilty of actionable fraud. They knew such representation to be false when made. The court, in fact, reversed the judgment for the plaintiff because of errors in the trial court's instructions. The excerpt quoted from the court's opinion in petitioner's brief, p. 29, clearly indicates what the Iowa court would decide when presented

with facts such as those disclosed by the record before this Court—where respondent, after a careful check, merely repeated, as information received from others, facts which were actually so received and which the uncontradicted proof shows respondent believed to be true and accurate.

In *Davis* v. *Central Land Co.*, 162 Ia. 269, 143 N. W. 1073, one of the defendants represented as of his own knowledge that a lot, the subject matter of the sale, extended to a rear alley, when in fact the lot ended 35 feet short of the alley. The agent did not qualify his statement in any respect by a showing that he was merely reporting information furnished by others. The facts were that he had no knowledge on the subject. This case presents the typical situation where a defendant asserts as of his own knowledge a fact concerning which he has no information. Such facts, of course, present actionable fraud, for as the Iowa court observes, p. 1075: "One who makes a statement under such circumstances can have no real belief in the truth of what he states."

The case of *Haigh* v. *White Way Laundry Co.*, 164 Ia. 143, 145 N. W. 473, illustrates the same legal principle. There the Court held that a pleading stated a cause of action in fraud where it alleged that defendant's agent, to induce the execution of a release, had positively asserted that plaintiff's injuries were trifling and that the tendons of her hand were not injured. There was no qualification whatever in the statement made by defendant's agent. He asserted a fact as of his own knowledge, as to which he apparently had no knowledge whatever.

The principle on which these Iowa cases were decided is sound. A seller cannot assert a material fact as of his own knowledge and then take refuge in the defense that he in fact knew nothing. There is no room for the application

of such a principle to the facts in the instant case. Here no statements as to Longview were made by respondent as of its own knowledge and respondent believed and had every right to believe that the circular was accurate and reliable, since every circular was subjected to a check and recheck by those persons who of all persons in the world knew the most about Longview.

The case of *Ultramares Corp.* v. *Touche, Niven & Co.*, 255 N. Y. 170, 174 N. E. 441, was decided, as appears from the excerpt from the opinion quoted in petitioner's brief (p. 37), upon precisely the same principle as the Iowa cases just reviewed. The defendants made a statement as true of their own knowledge, when they had, or at least a jury might find they had, no knowledge on the subject. The defendants in that case were certified public accountants charged with the duty of auditing the books of Fred Stern & Co. and certifying to the correctness of that company's balance sheet. The positive assertion of the auditors that the balance sheet accorded with the accounts of the defendant was not qualified in any way by a notice that this statement was based upon information furnished by others. It was a flat statement as of the auditors' own knowledge.

Mr. Justice Cardozo, (then Judge Cardozo) after rejecting the doctrine that the defendants could be held liable for negligent misrepresentation, laid down the true rule as follows, p. 447:

> "The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. Again and again, in decisions of this court, the bounds of this latter liability have been set up, with futility the fate of every endeavor to dislodge them. Scienter has been declared to be an indispensable element, except where the representation has been put forward as true

of one's own knowledge (*Hadcock* v. *Osmer*, 153 N. Y. 604, 47 N. E. 923), or in circumstances where the expression of opinion was a dishonorable pretense."

Counsel's assertion that no officers or employees of Long-Bell ever informed respondent that the industrial plants were within the corporate limits of Longview is an equivocal statement. If, as petitioner contends, the bond circular stated that these industrial plants were within the city limits of Longview, then certainly the examination of every preliminary and every final circular by Long-Bell's officers and employees and the approval of such circulars by its general counsel was equivalent to a definite assertion that all facts stated in the circulars were true and accurate. Likewise, the printed statements of The Long-Bell Lumber Company and Longview Company which were received by respondent and used in preparing the circulars contained definite statements by Long-Bell concerning the location of the industrial plants.

The statement that no executive officer of Halsey, Stuart & Co. testified that he believed the mill properties were within the city limits is equally equivocal. When Mr. Simond testified that at no time (prior to October 17, 1930) did he have any other or different information regarding the location of the mills than was contained in the circular, he most certainly affirmed his belief at all times in the accuracy of the facts there set forth. Petitioner repeatedly advances the argument throughout its brief that the duty rested on respondent to examine each executive officer of respondent as to his belief regarding the location of the city limits of Longview, despite the fact that they had no connection with the purchase or sale of these bonds. The law presumes on honest intent on the part of corporate officers performing their regular and legitimate corporate functions. The duty devolved on petitioner, which was

charging fraud, to prove by clear and unequivocal testimony a fraudulent intent. The charge that respondent acted recklessly in preparing its original bond circulars fails not only because of a total lack of proof to support the charge but because respondent's undisputed affirmative proof discloses the exact contrary.

II.

Fraud is never to be presumed. It must be affirmatively proved by such clear and convincing evidence as leaves the mind well satisfied that the charges are true. For this positive requirement of proof, petitioner asks this Court to adopt the principle that fraud may be presumed when it appears that the one charged with fraud might have discovered the facts by pursuing a line of inquiry other than that which was followed.

The Iowa law as to the essential elements of an action for deceit is not in doubt. The Supreme Court of Iowa in *Seymour* v. *Chicago & Northwestern Ry. Co.*, 181 Ia. 218, 164 N. W. 352, succinctly delimited the action as follows, p. 354:

> "In an action for damages by false representations the plaintiff has the burden of proving that the representations claimed were made, were false, known at the time to be false, were made with intent to mislead plaintiff; that there was reliance and damage, and no negligence in relying. *Gee* v. *Mass.*, 68 Iowa, 318, 27 N. W. 268; *Nason's Case*, 140 Iowa, 536, 118 N. W. 751; *Kilmartin's Case*, 137 Iowa, at 67, 114 N. W. 522; *Johnson* v. *Railway*, 107 Iowa, at 7, 77 N. W. 476."*

In the very recent case of *Dallas Real Estate Co.* v. *Groves*, ... Ia. ....., 292 N. W. 152, the Supreme Court of Iowa reviewed the Iowa decisions touching the burden which rests upon one who charges fraud and said, p. 155:

*For additional references see Summary of Argument.

"We quote from the case of *Johnson* v. *Tyler*, 175 Iowa 723, 157 N. W. 184, 187:

'It is also well settled that courts will not grant relief on the ground of fraud unless the fraud alleged and relied upon, and which if proven would justify the court in doing so, is established by clear, convincing, and satisfactory evidence.' See, also *Epps* v. *Dickerson*, 35 Iowa 301; *Ley* v. *Metropolitan Life Ins. Co.*, 120 Iowa 203, 94 N. W. 568.

A mere preponderance of the evidence is not sufficient. *Edmunds* v. *Ninemires*, 200 Iowa 805, 204 N. W. 219; *Clark* v. *Beck*, 208 Iowa 156, 225 N. W. 353

Fraud is not presumed. And in this class of cases, especially where title to real estate is involved, it must be established by clear, convincing, and satisfactory evidence. *Schrimper* v. *Chicago, M. & St. P. Ry. Co.*, 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; *Harvey* v. *Phillips*, 193 Iowa 231, 186 N. W. 910; *Edmunds* v. *Ninemires*, supra; *Epps* v. *Dickerson*, supra; *Johnson* v. *Tyler*, supra."

Applying these elementary principles to the evidence which petitioner asserts "justified a finding by the jury that respondent well knew the falsity of the statements in the offering circular" (p. 32), we find that petitioner is relying solely on presumptions. The jury, so petitioner asserts, should have been allowed to *presume* that respondent had knowledge of inaccuracies in the circular because some of respondent's officers when in Longview could have easily found out the exact facts or because Mr. Simond knew that the early assessed values of the lands in the several districts, just then emerging from raw farm land, was very low. This is precisely what the Iowa courts, and all other courts for that matter, have said should not be done in an action sounding in fraud.

Petitioner seemingly forgets that before respondent issued its first circular it asked The Long-Bell Lumber Com-

pany, in effect, if the statements in the circular were correct. It re-asked that question as it submitted each preliminary and final circular to Long-Bell for approval. It had the assurance of the Long-Bell officials, including its general counsel, that the statements were correct. By the very fact of its satisfactory business dealings with Long-Bell, respondent relied and was justified in relying on Long-Bell's approval of the circulars, knowing that Long-Bell was the founder and builder of the city. Why should it be presumed that, after having received definite confirmation from Long-Bell as to the accuracy of the facts set forth in the circular, Halsey, Stuart & Co. officials when in Longview would again make inquiry as to the same subject matter? Particularly is this true when it is remembered that Mr. MacNeille and Mr. Shrader had nothing whatever to do with the purchase of these bonds and were in Longview on matters in no way related thereto.

As a matter of fact, it does not appear that either Mr. Shrader or Mr. MacNeille were in Longview at any time after negotiations for the purchase of the Longview Local Improvement Districts Bonds were initiated. Mr. Shrader's first trip was before the city was built (Tr. 153), his second and last was in April 1924 (Tr. 167), more than a year before the purchase of the first districts bonds. Mr. MacNeille was out in Longview two or three times during the early stages of construction of the city (Tr. 214)—in 1922 and 1923 and "possibly a year or two later" (Tr. 228). So far as Mr. Sleep is concerned, Mr. Samuel Morris, the Vice-President of Long-Bell in charge of Longview operations, has no recollection of ever having seen or talked to him in Longview (Tr. 218, 228). In any event, Mr. Morris testified that "No questions were asked by representatives of Halsey, Stuart & Co. regarding the location of the industrial plants or regarding the amount of frontage on

the Columbia River or any of the other details with respect to the lay-out of the City of Longview" (Tr. 218). This testimony definitely negatives the presumptions and inferences upon which petitioner relies.

The information received by Mr. Simond regarding early assessed values of lands in some of the districts conveyed no knowledge to him as to the location of the industrial plants. The valuations received in 1925 covered only Districts 1 to 8 and had been determined nearly two years prior to 1925, when the land was farm property (Tr. 79-80). The only subsequent information received by Mr. Simond related to the assessed valuations for the City of Longview as a whole, which conveyed no information whatever as to the actual land values (Tr. 83) and certainly nothing as to what industrial plants were and what were not within the city limits. To allow a jury to presume knowledge of allegedly false statements in the circulars from such evidence would indeed be an extension of the law of deceit far beyond its adjudicated boundaries. The Circuit Court of Appeals did not, as petitioner suggests, substitute its own judgment as to the weight of evidence for the judgment of the jury. It merely found, as the record required it to find, that there was no proof whatever of knowledge on the part of respondent, and certainly nothing which rose to the dignity of clear, convincing and satisfactory evidence.

A number of statements are made by petitioner under Point II which are subject to challenge. For instance, the assertion (p. 35) that "the mill properties of the Long-Bell Lumber Company constitute a very substantial part of the security for the Lumber Company's first mortgage bond issues". No record pages are referred to for support of this statement and we can find none. It does appear that two of these bond issues, secured by Long-Bell's vast timber holdings, came out in 1922 and 1923 (Tr. 115), which

was before the Longview mills were constructed. It seems unnecessary, however, to burden the Court with further argument. When every alleged fact is examined and every argument considered, petitioner's Point II boils down to nothing more than a contention that the jury in a fraud action should be allowed to presume knowledge on respondent's part that the facts were not what The Long-Bell Lumber Company stated them to be. The essential requirement of proof of knowledge is blithely dispensed with by petitioner and conjecture and inference offered as a substitute therefor.

Moreover, all talk about respondent intentionally misstating the facts in its circular regarding "Longview" is patently absurd. Why should respondent, all other considerations aside, have had the slightest interest in misrepresenting any facts regarding the City of Longview? Admittedly, the Local Improvement Bonds were not advertised and were not sold by respondent on the basis of the land values in each district. The whole emphasis in selling the bonds was placed on the Long-Bell guaranty, since at best the city was in its initial stages of development. It could have made no possible difference to respondent, therefore either in purchasing or selling the bonds, whether certain industrial sites were within or without the technical city limits. The fact that respondent, two and three years after the last of these improvement districts bonds had been marketed, continued to buy large amounts of the bonds for its own account and to pay high prices for them (Tr. 617-9) indicates more clearly than any mere statement of witnesses could do its complete trust and confidence in The Long-Bell Lumber Company and reliance on the accuracy and truth of the representations made by that company.

III.

The record contains no proof that respondent made any false statements or spoke any "half-truths" regarding the financial condition of the Long-Bell Lumber Company. Petitioner's complaint is that respondent did not voluntarily disclose to petitioner every detail regarding Long-Bell's condition which came to respondent's knowledge during the year 1930. No such duty was imposed upon respondent under the Iowa law.

The charge made by petitioner in its amended complaint is that respondent wilfully, fraudulently and falsely concealed the true financial condition of The Long-Bell Lumber Company from the petitioner (Tr. 32). To establish fraudulent concealment, where there is no fiduciary relationship, there must be much more than a mere failure to communicate facts within the knowledge of the seller. There must be evidence of affirmative concealment—words or acts on the seller's part which tend affirmatively to a suppression of the truth. The Circuit Court of Appeals correctly stated the Iowa law on this subject when it said (Tr. 669):

> "The cases which hold that failure to disclose material information constitutes fraudulent concealment sufficient to maintain an action for fraud generally are based on such facts as the existence of a fiduciary relationship between the parties, or the doing of some affirmative acts to prevent the other party from making adequate investigation to discover the true facts."

The adherence of the Iowa courts to this fundamental rule is illustrated by the case of *Gamet* v. *Haas*, 165 Ia. 565, 146 N. W. 465, which was an action at law for damages on account of alleged fraud in the sale of the capital stock of a milling company. The petition alleged that in making the sale the defendant knowingly and with intent

to deceive neglected to apprise plaintiff of the indebtedness of the company, although that fact was well known to the seller. The court held that there was no duty on the part of the seller to disclose facts as to the financial condition of the corporation so long as there was no fiduciary relationship between the parties and no effort made by the seller to prevent the buyer's acquiring the fullest information. The court said (p. 466):

> "Nor does there appear any merit in the allegation that defendant withheld information concerning the assumed indebtedness. The undertaking to pay it was the consideration paid for the property acquired, and at the time of the transaction in controversy only the $3,400 owing Mrs. McHenry remained unpaid. This was no mentioned, nor did plaintiff make any inquiries as to what the company owed, or concerning its title to the property. There was no fiduciary relation; they dealt at arm's length, and the record is void of any circumstance which might obviate the application of the doctrine of *caveat emptor.*"

So in *Boileau* v. *Records & Breen,* 165 Ia. 134, 144 N. W. 336, a verdict was directed against the plaintiff, who claimed damages for fraud, alleging that the defendant had concealed the facts as to the incompetency of a certain grantor, which incompetency was known to the defendant and prevented title passing by the tax deed purchased by plaintiff from defendant. In affirming, the court said (p. 338):

> "When a vendor by quitclaim deed make false representations upon which the buyer relies, he cannot escape liability for his fraud. *Ballou* v. *Lucas,* Ad'm, 59 Iowa 22, 12 N. W. 745. But the rule as thus stated does not apply without qualification, when concealment is the basis of the charge of fraud. Mere silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation, and in the absence

> of a duty to speak it is not of itself ground for an action of deceit. 20 Cyc. 15. When the relations between the parties are of a confidential nature, under which one has the right to rely upon the good faith of another, and if there be a concealment of a material fact, within the knowledge of the vendor, and which the vendor is bound in good faith to disclose, such may amount to actionable fraud. But when the subject-matter of the representation or concealment is one as to which the purchaser has equal and available means of information, he must make use of them, and in failing to do so he cannot recover on the grounds that he was misled. *Boddy* v. *Henry*, 113 Iowa 463, 85 N. W. 771, 53 L. R. A. 769. These statements of general rule are but the expressions of many authorities, and are so well settled that extended citations are unnecessary."

In the early case of *Sherman* v. *Harbin*, 125 Ia. 174, 100 N. W. 629, which involved alleged fraudulent concealment by an obligee on a surety bond, the court quoted with approval from a decision by the Supreme Court of South Carolina and from the language of this Court in *Magee* v. *Manhattan Life Ins. Co.*, 92 U. S. 93, as follows:

> " 'There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear.' In *Magee* v. *Manhattan Life Ins. Co.*, 92 U. S. 93, at 99, 23 L. Ed. 699, the court said: 'A fraudulent concealment is the suppression of something which the party is bound to disclose. To constitute fraud, the intent to deceive must clearly appear.' "*

It is conceded that no fiduciary relationship existed between petitioner and respondent. The parties were dealing at arm's length. Mr. Hubbell was a bond buyer of many years' experience, having purchased for his company millions of dollars of special assessment, as well as other

*For other Iowa cases to the same effect see Summary of Argument.

types of municipal bonds (Tr. 188, Deft's Ex. 1). Respondent was but one of fifteen investment houses from which the petitioner was purchasing securities in 1930 (Tr. 186).

As the Circuit Court of Appeals properly finds (Tr. 669), the only word or act which petitioner can point to as sustaining its claim that respondent intentionally concealed the financial condition of The Long-Bell Lumber Company from petitioner is the statement in Wood's formal offering letter of May 14, 1930:

> "We *believe* you have before you practically all the data covering this issue of bonds, but if you have *any question* in mind, we shall be pleased indeed to have you call Mr. Kelley or this office for *anything you may need*" (Italics ours) (Tr. 466).

The Court will recall the circumstances under which this statement was made. Mr. Wood had furnished to petitioner not only all the specific data which it had requested, such as The Long-Bell Lumber Corporation audited report for the year ended December 31, 1929, a digest of the Washington improvement district laws, and a statement as to the bonds of all districts retired and those still outstanding, but had also sent to Iowa for delivery to petitioner the contents of Halsey, Stuart & Co.'s own buying file. This was an unusual step in supplying a prospective customer with information, and something which, so far as Wood could recall, had never been done before. "To that extent we went very much further in the matter of furnishing information than would be customary and usual in such a sale" (Tr. 331).

Having supplied petitioner with all the "data covering the issue" which he could lay hand to, it was most natural and proper for Mr. Wood to express the belief that petitioner now had before it "practically all the data covering this issue of bonds". That such was Wood's honest

belief is undisputed. He testified that he did not "consciously withhold from the Equitable Life Insurance Company of Iowa any information which I had in my possession relative to The Long-Bell Lumber Company or its financial condition" (Tr. 332). Mr. Wood, by the way, was a disinterested witness, having left respondent's employ many years before the trial (Tr. 334).

To call such a statement, honestly made, an intentional effort to mislead petitioner and conceal facts from it is indeed a perversion of the record without justification. To say that Wood's statement was calculated to persuade petitioner to forego an additional independent investigation on its own account is to disregard the plain request of respondent that "if you have *any question* in mind, we shall be pleased indeed to have yau call Mr. Kelley or this office for *anything you may need*". The Circuit Court of Appeals could not, we submit, have properly reached any other conclusion than the one stated in its opinion—"We think this cannot be construed as a deliberate attempt to throw appellee off its guard or mislead it into failing to pursue its inquiries further" (Tr. 670).

Much is said by petitioner's counsel about "half-truths" spoken regarding Long-Bell's financial condition, but none are pointed to in the record. There were none. Respondent furnished to petitioner *exactly what it asked for.* Hubbell's request was specifically for the Long-Bell annual report for the year ended December 31, 1929. He asked for no other financial data (Tr. 297, 315-16). Hubbell admits "that during the period between May 1, 1930 and May 17, 1930, which was the date the Finance Committee approved the purchase of $85,000 or $100,000 of these bonds, Mr. Kelley gave me any information I asked for and, as a matter of fact, that continued to be so not only prior to the purchase of these bonds but prior to the purchase of any

subsequent L. I. D. bonds, and prior and subsequent to the purchase of all bonds'' (Tr. 192).

It is not contended that the audited report of Long-Bell for the year ending 1929 is in any respect inaccurate. No questions were asked by petitioner regarding Long-Bell's financial condition and no statements, written or verbal, were made by respondent on this subject. Just what application can be made by respondent of the much discussed doctrine of ''half-truths'' on such a record we are at a loss to understand. Incidentially, as the Circuit Court of Appeals points out (Tr. 668), the annual report of Long-Bell gave petitioner much more than the financial picture of the Company at the end of the year 1929. It pointed out the falling off in the lumber business due to business conditions and the break in the stock market, and stated that indications were not flattering for the immediate future (Tr. 468). The report showed that the Company had no taxable income for the year 1929 (Tr. 474).

In answer to petitioner's argument that respondent was advised during the year 1930 of facts regarding The Long-Bell Lumber Company's financial condition which led respondent's officers to doubt the soundness and worth of Long-Bell's guaranty of the improvement districts bonds, it is sufficient to point out that nothing which respondent's officers learned regarding Long-Bell during 1930 was regarded by them as reflecting adversely on Long-Bell's financial condition. The steps which Long-Bell took to improve its current financial position were regarded by respondent's President as ''nothing more than the efforts of a well-managed company, in view of the conditions in 1930 and the then period of time, to put itself in a more liquid position'' (Tr. 100), which in his opinion did not reflect upon the integrity or solvency of the Long-Bell Company (Tr. 101). As Mr. Shrader, respondent's Vice-President,

pointed out, none of these transactions "then or at any time indicated to me in the slightest that The Long-Bell Lumber Company was in distress or financial peril, or anything of that kind" (Tr. 167). "I had not the slightest doubt of the solvency and ultimate success of The Long-Bell Lumber Company at that time" (Tr. 166).

The best business judgment at the time dictated the procedure followed by Long-Bell. The sales of capital assets not needed in Long-Bell's business, such as the railroad and the electric light plant, at prices which brought into the Company's treasury its full investment in these properties, were naturally regarded by Long-Bell officials and respondent's officials alike as most favorable sales for the Company and a legitimate strengthening of its current position to meet the unfavorable conditions of 1930 (Tr. 353-4). It was most natural, therefore, that Mr. Wood should write to Mr. Hubbell, when he heard about the sale of the Longview, Portland & Northern Railroad, and tell him the good news (Plff's Ex. B-40, Tr. 483). Mr. Hubbell frankly admits that he was familiar with business conditions in 1930 and knew that not only the lumber business but most large industries were suffering from the general effects of the depression (Tr. 202).

So far as the current financial condition of the Lumber Company was concerned, the information was public property. Quarterly statements were furnished the New York Stock Exchange, made available to the daily press, and published in all the principal financial journals, at least three of which were taken and read by the petitioner (Tr. 145-6, 355, Deft's Exs. 39-45, 49-50).

The sincerity of respondent's officers in their belief that nothing occurred during 1930 which adversely affected Long-Bell's financial condition is amply demonstrated by the fact that respondent continued throughout 1930 and

well in to 1931 to buy for its own account and with its own funds substantial blocks of Longview Improvement bonds, as well as other Long-Bell issues (Tr. 100, 619).

On the record before this Court, petitioner's charge of fraudulent concealment must rest upon the failure of respondent to *voluntarily disclose* to petitioner information which respondent acquired during 1930 bearing upon the financial condition of The Long-Bell Lumber Company and which respondent honestly believed reflected favorably upon the Company's financial position. The authorities relied upon by petitioner indicate how far the Iowa authorities and the authorities generally fall short of supporting the thesis that a mere failure to disclose constitutes fraudulent concealment.

Noble v. *Renner,* 177 Ia. 509, 159 N. W. 214 (Pet. brief, p. 43), involved much mor than a mere failure to disclose. In that case, as the Court of Appeals points out (Tr. 669), there was a direct affirmative misrepresentation. The case was not decided on the ground that the defendant merely failed to disclose a changed condition in the land, but on the ground that he affirmatively represented that there had been no more cutting of the bank and by affirmative acts and words sought to conceal the change from plaintiff. This is clearly pointed out in the portion of the opinion quoted in petitioner's brief (p. 44), where the Court says:

> "Is there not more here than a mere case of silence which amounts to a failure to state that which both knew or had equal means of knowing? Is there not affirmative concealment intended to lead another to his injury? * * * It is undenied, too, that defendant was not content with mere silence. It appears that on May 2, before the contract was signed, defendant told Noble there was no cutting there any more; that there would be a little sloughing of the bank in the Spring when the frost was going out."

Noble v. *Renner* is inapplicable to the facts in the instant case where, at most, all that respondent did was fail to voluntarily inform petitioner of everything it learned during 1930 relating to The Long-Bell Lumber Company.

The case of *Tyler* v. *Savage*, 143 U. S. 79, (Pet. Brief, p. 46) bears no resemblance to the instant case. There one Tyler, to induce the purchase by the plaintiff of stock in the Virginia Oil Company, represented that the last dividend declared was a 7% semi-annual, that the fiscal year ended on the first of June, that the prospects of the company were flattering, and that its manufactures paid a large profit, when in fact the company was insolvent and known by Tyler to be so. On a bill filed for an accounting and other relief, the court held Tyler liable, saying (p. 97):

> " * * * the statement of the decree that the company was represented to the plaintiff by Tyler, its president, to be in a flourishing condition, when in fact it was insolvent, is a sufficient support of the allegations of fraud made in the bill."

The court, in discussing the further representation made by Tyler with regard to the declaration of a dividend, used the language quoted by counsel on page 47 of petitioner's brief. Tyler had made an equivocal statement regarding the amount of the last dividend paid and the date when the fiscal year ended, which was well calculated to lead the plaintiff to believe that 7% dividends were then being paid and would be paid in June. Such a statement, coupled with the other false statements made about the company and Tyler's knowledge of its insolvent condition, was properly characterized as equivalent to a false representation.

None of the elements present in *Tyler* v. *Savage* is present in the case at bar. Respondent did not make an equivocal statement regarding Long-Bell's financial condition.

On the contrary, it presented to petitioner exactly what petitioner requested.

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, 32 L. Ed. 439, (Pet. Brief, p. 47) is similar to the case of *Laidlaw* v. *Organ*, 2 *Wheaton* 178, 4 L. Ed. 214, which is cited by petitioner in its summary of argument. Both cases involve a series of *affirmative* fraudulent acts designed to deceive. In other words, there was an *active* attempt to mislead plaintiff by requesting him not to make inquiries concerning the truth of the defendant's statements. Here again there is presented a case of a party fraudulently and improperly preventing the plaintiff from procuring the information requested. The language cited at p. 48 of Petitioner's brief is exactly in accordance with the law, i.e., that there must be a duty to speak or an intentional and conscious misleading of the plaintiff. The evidence in these cases clearly disclosed a series of false representations by the defendant and a deliberate design to mislead the plaintiff by throwing "unreasonable obstacles in his way to prevent his procuring the information that he sought and that he desired" (p. 386).

The case of *McDonald* v. *de Fremery*, 142 Pac. 73, (Pet. Brief, p. 48) and the same case later reported in 176 Pac. 38, involved an affirmative representation known by the defendants to be false at the time it was made. In that case the defendants, who were officers of the bank and fully advised as to its condition, gave the plaintiff what purported to be a summary of a report, with the statement that it "correctly set forth the financial condition of the bank as shown by the books of the bank". As a matter of fact, not only was this statemnt false, but the purported summary was not in fact a truthful and accurate summary, since it failed to set forth material facts regarding the bad debts and worthless and overdue paper of the bank, all

of which were disclosed in the actual report in the bank's possession. This, of course, involves a clear case of a direct affirmative misrepresentation, as well as an affirmative concealment, by representing to the plaintiff that the summary correctly set forth the substance of the report. There is no possible relationship between the facts which were before the Court in that case and the facts in the instant case.

In *Downey* v. *Finucane,* 205 N. Y. 271, 98 N. E. 391, (Pet. Brief, p. 49) the promoters of a corporation were held liable for a prospectus which they caused to be prepared and issued, containing, among others, the statement that the company "owns a franchise in the City of New York acquired under the advice of eminent counsel, under which it is its purpose to begin as soon as practicable, and in the near future, the construction of an independent telephone system in that city". The facts were that the franchise had only been used for a burglar alarm system, that in order to become effective it required the consent of the common council of New York City, which had not been obtained, and that all of these facts were known to the defendants. There were other material misstatements in the circular, but this clear misstatement, knowingly made, was enough to justify the submission of the case to a jury.

This and similar cases cited by petitioner were characterized by the Circuit Court of Appeals as involving "obvious and flagrant falsities under circumstances permitting of no doubt as to the maker's knowledge" (Tr. 672). A decision upon such a state of facts falls far short of being an authority for the plaintiff's proposition that the failure of Halsey, Stuart & Co. to advise the plaintiff of all facts and circumstances coming to its attention regarding the financial affairs of Long-Bell constituted a

fraudulent representation which plaintiff was entitled to submit to a jury as such.

In *Foreman* v. *Dugan*, 205 Ia. 929, 218 N. W. 912, cited by petitioner at page 44, the Supreme Court sustained the action of the trial court in directing a verdict for the defendant, although the undisputed evidence showed that the defendant had failed to disclose the fact that in previous years a ditch on the farm, which was the subject matter of sale, had overflowed and flooded the land. The Court said, 218 N. W., p. 914:

> "The appellant *made no specific inquiry in regard to the ditch* and was truthfully informed by the vendor with regard to the overflow from the river. Under the record in this case, the appellant did not make a case to go to the *jury without proof of a false representation knowingly made by the vendor,* by express words *or failure to speak when required to do so,* with regard to a material matter." (Italics ours)

It is this case which, reflecting a factual situation at least similar to that of the case at bar, enunciates the correctly applicable Iowa rule.

A.

Respondent, having furnished to petitioner the exact information regarding The Long-Bell Lumber Company which was requested, does not become guilty of fraudulent concealment by failing to voluntarily disclose subsequent financial transactions of Long-Bell. Especially is this so where, in the judgment of respondent's officers, there were no developments adversely affecting Long-Bell's guaranty of the Improvement Districts Bonds or which caused respondent to cease the purchase of these bonds for its own account.

Petitioner predicates its argument under Point III A upon the assumption that positive representations were made by respondent regarding the financial condition of The Long-Bell Lumber Company as of May, 1930. It is

then argued that subsequent developments in the Long-Bell financial picture imposed upon respondent the legal duty of advising petitioner of all such developments. As we have already pointed out in some detail in this brief, the assumption upon which petitioner proceeds is false. No representations whatever were made by respondent concerning the financial condition of The Long-Bell Lumber Company. It merely furnished to petitioner the information which it requested, as reflected in the audited report of the Lumber Corporation and subsidiaries for the year ended December 31, 1929.

No decision of any court has been cited by petitioner where, on such a state of facts, the seller has been held liable for fraudulent concealment for mere failure to voluntarily disclose subsequent information coming to his knowledge.

But in the instant case we have the added fact that the record discloses without dispute that no information regarding Long-Bell came to respondent which, in the opinion of respondent's officers, adversely affected the financial position of The Long-Bell Lumber Company. At no time during the year 1930 did respondent learn "that the Lumber Company's guarantee had become seriously impaired" (Pet. Brief, p. 53). It did learn that *one* commercial bank out of the nine which were extending the Lumber Company a total line of credit of $9,000,000, had withdrawn its line of credit for $500,000 sometime in the Spring of 1930 (Tr. 3448); that later in the year The Chase National Bank of New York, *which was not then a creditor* of the Lumber Company, had suggested—not demanded—that the Lumber Company consider the strengthening of its credit position by forming a separate corporation to take over certain free assets and do all the bank borrowing for the Company (Tr. 349); that this suggestion was first given serious

consideration by Long-Bell officials in the latter part of July or the first of August, 1930 (Tr. 349), and in the middle of September it was decided that the formation of such a company was a desirable thing to do (Tr. 350), and the Sales Corporation was organized and the assets turned over to it on December 9, 1930, effective as of November 1, 1930 (Tr. 351).

Respondent further learned during 1930, as we have already pointed out, of the steps taken by Long-Bell, in view of business conditions then facing all industries, to improve its current cash position by the sale, on a most favorable basis, of the L., P. & N. Railroad and the Longview power plant(Tr. 353-4, Plff's Ex. B-12), and the further efforts to increase its cash reserved by borrowing on some large timber sales contracts and a newspaper property in Longview.

To call respondent's failure to volunteer any of the above information to petitioner during 1930 a fraudulent concealment of facts is to extend the law of intentional frauds beyond any of the boundaries heretofore defined by the courts. Certainly the one Iowa case relied upon by petitioner—*Noble* v. *Renner,* 177 Ia. 509, 159 N. W. 214—does not support such a doctrine. The short excerpt from the opinion of the Court in that case, cited at p. 52 of petitioner's brief (which is, in fact, a quotation from 20 Cyc., p. 24), must be considered in connection with the facts that the Court was passing upon. There, as we have already indicated, the Court properly found not only an affirmative false representation—that there had been no more cutting of the bank since plaintiff inspected the farm—but statements by defendant amounting to affirmative concealment, by inducing plaintiff to make no further investigation. The basis of the Iowa court's decision is clear. It said, p. 217:

> "It is a case of what is, in effect, false token. It is not different in principle than bargaining to sell a hotel building, sending the proposed buyer to look at it, having him find that the building is somewhat racked and would not stand heavy winds, learning later that a wind had blown it to the ground and scattered the fragments, *affirmatively telling the buyer before he contracts that the building was substantially as it was when he saw it*, and claiming that, though there was no building when the purchase was completed, yet there could be no rescission." (Italics ours)

The facts in the instant case, as the Circuit Court of Appeals points out (Tr. 669), cannot be fitted into the decision of *Noble* v. *Renner.*

The case of *Loewer* v. *Harris*, 57 Fed. 368, is equally inapplicable, as sufficiently appears from the excerpt from the opinion quoted at pp. 52-3 of petitioner's brief. That was a case of a clear affirmative misrepresentation. The plaintiff was told by defendant that the figures contained in an earlier prospectus of a brewing business showing the profits which the business was making were correct and that the business was showing the same gradual increase that it had previously. Relying on this statement, the plaintiff signed the contract. Later plaintiff discovered that the statement was false and that, instead of increasing, both output and profits had materially diminished during the period covered by defendant's representation.

The Circuit Court of Appeals in that case quotes with apparent approval from the instructions of the trial court to the jury, in which he said (p. 372):

> "'But you must be extremely careful to understand that the defendant was not under any obligation to disclose the unfortunate condition of the business after the interview, *unless he had represented at that time* that the business was doing substantially as well as previously. If you are not satisfied that the defendant

made such a statement at the interview with plaintiff, then you are not to go into the condition of the business subsequently, because the defendant was *under no obligation to volunteer any statement* about its condition at all and, unless he made a statement at the interview, was under no obligation to modify it in any way or to make any further statement about its condition at any subsequent time.' ". (Italics ours)

In short, the decision of that case rested upon the fact that the defendant made a false representation as to the continuing condition of a business—that output and profits were increasing. He was obviously held liable upon the basis of this continuing representation, a factual element which is completely lacking in the instant case. It cannot be contended that respondent either by word or act ever represented to petitioner that the financial condition of The Long-Bell Lumber Company continued the same during 1930 as the condition disclosed by the audited report for the year ending December 31, 1929.

We respectfully submit that neither the Iowa Supreme Court nor any other court of last resort has ever held that, where a seller of securities furnishes to a buyer, at the buyer's request, an accurate financial statement of the issuer of securities and offers to supply any additional information that the buyer may require, the seller becomes liable for fraudulent concealment if he does not thereafter voluntarily advise the buyer of any financial transactions of the issuing company which a court or jury might subsequently think were material. Especially is this so where a seller does not regard such transactions as in any way reflecting adversely upon the financial condition of the issuer or the worth of the securities. To suggest that such is the rule of law is to impose upon the seller a continuing obligation of guaranty far beyond that ever established by the decisions.

IV.

Under Iowa law the rule of *caveat emptor* is applied whenever the parties are dealing at arm's length and there is no evidence of fraudulent concealment. In the instant case there was no evidence of false or equivocal statements made by respondent regarding Long-Bell's financial condition. The Court, therefore, properly applied the Iowa law in holding that respondent was under no duty to voluntarily disclose facts coming to its knowledge.

The statement of petitioner that the rule of *caveat emptor* has no application to business transactions concerning the credit and financial standing of third persons is not supported by the Iowa decisions. *Gamet* v. *Haas,* 165 Ia. 565, 146 N. W. 465, discussed at pages 46-7 of this brief, stated the exact contrary. See also *Wagner* v. *Standard Seed Tester Co.,* 194 Ia. 1330, 191 N. W. 314, at p. 315.

Petitioner, however, does not argue the rule of *caveat emptor,* which only properly applies where the seller has not been guilty of fraudulent concealment. On the contrary, petitioner again *assumes* that the evidence discloses false or misleading statements made by respondent concerning Long-Bell's financial condition and then argues from this premise that respondent was under a duty to voluntarily disclose all additional facts which it knew or later learned bearing upon the Long-Bell situation. The assumption, as we have pointed out and as the Circuit Court of Appeals properly found, is false. Halsey, Stuart & Co. would have been pleased, as the record clearly shows, to have furnished petitioner "anything that you may need" or to answer "any questions" that petitioner had in mind regarding Long-Bell and its financial condition. It fully complied with the only request which petitioner made for financial data.

To sustain its contention that there was any issue of fraudulent concealment to go to a jury, petitioner must support the thesis that, where the seller makes no false representation whatever as to the financial condition of the issuer of securities, where the seller and buyer are admittedly dealing at arm's length, and where the seller offers to supply all information that the buyer requests and does no affirmative act to conceal from the buyer any fact or circumstance regarding the issuer, the seller is still under a legal duty to disclose any information coming to its possession regarding the financial condition of the issuer, whether or not it deems such information material.

The Iowa cases cited under Point III of this brief, to some of which we have already directed the Court's attention, show clearly that no such duty is recognized by the Iowa courts. Nor do the cases cited by petitioner support such a theory. We have already commented on *Foreman* v. *Dugan*, 205 Ia. 929, 218 N. W. 912, and *Noble* v. *Renner*, 177 Ia. 509, 159 N. W. 214 (This brief pp. 57, 59, 63).

The case of *Iasigi* v. *Brown*, 17 Howard, 183, (Pet. brief p. 55), involved the most flagrant kind of an affirmative misrepresentation. The plaintiff requested information respecting the credit of one Thompson and his firm. In response, the defendant wrote two letters, one setting forth detailed reasons intended to lead plaintiff to believe defendant had confidence in the credit of Thompson and his firm, and the other, of later date, affirming the "favorable opinion of the concern" alluded to. As a matter of fact, and as was stated by the defendant, "at the time the letter was written they had lost their confidence" in Thompson. Furthermore, the defendant knew the statements in the letters were false for, in fact, a transfer of all of Thompson's property had been made to the defend-

ant before the first letter was written. The defendant was liable because of affirmative representation known to be false when made. Such a case has no possible relation to the case before this Court, where no fraudulent or misleading statements were made.

In the case of *Thermoid Rubber Co.* v. *Bank of Greenwood,* 1 Fed. (2d) 891, (Pet. brief, p. 57) the plaintiff applied to the defendant bank for information as to the credit standing of the Owen Tire Company. One Self, who had been a large stockholder of the Tire Company and was then Chairman of the Board of defendant bank, had personally taken up a large part of the Tire Company's indebtedness to the Bank and the Tire Company was virtually in liquidation. There was also evidence that Self had conspired with the President of the Tire Company to cause it to stock up heavily on tires in anticipation of impending bankruptcy. In these circumstances and with full knowledge of the facts, the Bank answered plaintiff's inquiry by stating that it had loaned the Tire Company on the Company's own paper; that the loans had proven very satisfactory and had been materially reduced; that it considered the Company in good shape and as having made successful progress and worthy of a line of credit with the plaintiff. The Bank knew that these statements were untrue. As the court said, p. 894: "If it was liable at all, it was liable for stating as true something it knew to be untrue, or about which it knew it was in ignorance".

Petitioner again indulges in the argument that it was respondent's duty to "make a reasonably full disclosure of the true facts" and not to "indulge in half-truths and misleading statements as to the true facts". It neglects to point out to this Court any misleading statements or any half-truths regarding Long-Bell's financial condition spoken by respondent. In short, petitioner, under both points

III and IV of its brief, has argued a case which does not exist on the record. The principles which petitioner contends for are sound when applied to the facts of the cases which petitioner cites. They fail of application in the instant case where no evidence whatever of false or misleading statements regarding Long-Bell's financial condition was presented.

V.

The construction to be placed on an alleged written representation, as well as the materiality of such representation, are questions of law for the Court. The Circuit Court of Appeals was right in the construction which it placed on Wood's letter of May 14, 1930, and the undisputed proof shows that petitioner did not rely on the statement as a representation that there were no outstanding bonds of any other municipal body which were a charge upon lands within the several improvement districts.

The allegation of the amended complaint is that respondent wilfully, maliciously, fraudulently and falsely represented to petitioner "that the City of Longview had no funded debt other than the City of Longview Local Improvement Districts bonds, *which constituted a charge or lien upon the lands and property included within the various Local Improvement Districts of the City of Longview*" (Tr. 11). To sustain this charge, petitioner relies on the sentence contained in Wood's letter of May 14, 1940, reading:

> "You observe, of course, that this city has no funded debt, other than these improvement bonds, and that the original debt has been materially reduced through retirement and maturity" (Tr. 466).

In short, the petitioner seeks to expand Wood's simple statement that the City of Longview "has no funded debt,

other than these improvement bonds" into a declaration that there were outstanding no bonds of *other* political subdivisions which constituted liens upon lands within the improvement districts.

The first answer to this contention is that Wood obviously did not make the statement which petitioner seeks to attribute to him. He referred to only two possible classes of bonds—bonds of the City of Longview and bonds of the Improvement Districts. His comment that Longview had no funded debt was admittedly accurate. His further statement—"other than these improvement bonds"—added but one additional thought to the sentence—that the Improvement Districts bonds were a part of the funded debt of the City of Longview. This was inaccurate. Mr. Hubbell testified, however, that before he bought a single improvement bond he knew that these bonds were not funded debts of the City of Longview but the obligations of approximately twenty separate improvement districts (Tr. 193). The inaccuracy admittedly did not mislead Mr. Hubbell. To read into this simple sentence in Wood's letter a further representation that there were no bonds of any other municipal bodies for the payment of which lands within the limits of Longview might be subjected to a tax, goes beyond all possible limits of reasonable and fair construction.

The second answer to the contention is that neither Wood when he wrote the letter nor Mr. Hubbell when he read it thought that the sentence in question had any reference to the Cowlitz County Diking District bonds or to the bonds of any other separate municipality. The settled practice for years prior to 1930 and for several years thereafter in buying and selling municipal bonds was to make no inquiry as to "overlapping issues", that is, issues of other municipal bodies that might include, in whole or in part, the ter-

ritory of the particular municipality whose bonds were the subject of purchase or sale (Kelly, Tr. 307, Wood, Tr. 332, Hubbell, Tr. 186-7). Mr. Hubbell frankly admits: "It was not my practice up to and including 1930 in making purchases of municipals of any kind to ascertain in advance of the purchase the overlapping municipal districts which were involved. In other words, I made no investigation to determine when buying a waterworks bond in the town of X to discover how many city bonds were outstanding in that town or how many school bonds or county bonds" (Tr. 186-7). Mr. Hubbell could not have had in mind, therefore, that Wood was making a representation that there were no drainage district bonds outstanding which might be a lien on some of the lands in the City of Longview, for the subject of such overlapping issues was not in the minds of either Hubbell or Wood—it was a subject with which neither buyer nor seller concerned himself in 1930.

It is further of significance that Mr. Hubbell at no time claimed that he understood from the last paragraph of Wood's letter that respondent was representing that there were no outstanding bonds of the Cowlitz County Diking District or of any other municipal body, taxes to pay which were liens on lands in the City of Longview. Although Mr. Hubbell was asked what he understood from a reading of certain other exhibits, no similar question was ever propounded as to the Wood letter, Plaintiff's Ex. B-24.

A case very much in point is *Readinger* v. *Rorick*, 92 Fed. (2d) 140 (C. C. A. 6th), heretofore cited in another connection. The suit was based on alleged false representations and concealments of facts in connection with the sale to plaintiff of a large block of bonds of an improvement district located in San Diego County, California. It was claimed, among other things, that the bond circular falsely stated that the "total bonded indebtedness of district" was

$295,000. This was the correct amount of the outstanding bonds of Improvement District No. 38 but, just as in the case at bar, District No. 38 was included within an irrigation district against which there were outstanding over $2,000,000. of bonds, a part of which were naturally chargeable against the lands within District No. 38. The court held that the statement in the circular did not constitute a false representation because it was not intended to refer to the bonds of overlapping municipal districts, it not being customary to take account of such overlapping issues in the purchase and sale of municipal bonds. The court said (p. 144):

> "With reference to the statement 'Total Bonded Indebtedness of District, $295,000.00' this figure is literally true as applied to the district as a unit, but it is not true that this was the maximum bonded debt actually chargeable to lands within the district. This involves overlapping issues.
>
> District No. 38 was included within the La Mesa Lemon Grove and Spring Valley Irrigation District of 18,000 acres against which there were outstanding $2,057,000 of bonds. On a proportional acreage basis this would charge District No. 38 with over $130,000 more of bonded indebtedness. There was a further large overlap in Zone E and A from A. and I. D. No. 25. Thus it seems that the actual bonded indebtedness chargeable to land lying in the district was far in excess of the $295,000 figure appearing in the circular. But Rorick, one of defendants, testified that he had seen scores of circulars and had never seen a reference to overlaps. It does not seem to be customary to make reference to them in such circulars."

The suggestion that respondent was guilty of fraudulently concealing the existence of the Cowlitz County Diking District is equally devoid of merit. These bonds had been issued in 1925 and widely advertised and circularized throughout the United States (Tr. 84, 376). Moreover, the

nnual report of The Long-Bell Lumber Corporation and ubsidiaries, furnished to petitioner before the purchase of ny of the improvement bonds, gave petitioner detailed in-ormation regarding the outstanding Cowlitz County bonds. he amount of such bonds outstanding, the purpose for hich they had been issued, their maturity, and the fact hat they were payable out of assessments made by the iking District against the lands comprised within the dis-ict, the proportion of such assessment, together with Im-rovement Districts assessments, levied against land of the umber Company and subsidiaries as of December 31, 1929, nd the fact that the Diking bonds, like the Improvement istricts bonds, were unconditionally guaranteed as to oth principal and interest, were all fully disclosed by this ocument (Tr. 474-6), which Hubbell admits he read be-ore he purchased a single bond (Tr. 190-1). In addition, Ir. Hubbell admits he knew that the City of Longview was onstructed in the valley at the confluence of the Cowlitz nd Columbia Rivers and that Long-Bell had constructed he dikes, to pay the cost of which the Diking District bonds ere issued (Tr. 191).

In fact, the only detail regarding the Cowlitz County iking District which Hubbell claims he did not learn until fter he purchased the bonds was the exact boundaries of he district. That respondent would furnish petitioner ith all of the information relating to the Diking District utlined above, but fraudulently conceal the open and no-orious fact as to the boundaries of the district, is indeed ncredible. Nor is there the slightest basis for imposing a egal obligation on respondent to volunteer further inform-tion on a subject so collateral to the Improvement Dis-ricts bonds as the Cowlitz Diking District, when Mr. Hub-ell, with all the data in his possession regarding those onds, did not have sufficient interest in the subject to ask

Kelley or anyone else connected with respondent a single question respecting the Diking District or its bonds.

Petitioner complains because the Circuit Court of Appeals found that the representations contained in Wood's letter were not material and presented no issue of fact for submission to a jury. We submit that on the record before this Court no other conclusion is possible. It was the duty of the trial court, as respondent properly requested it to do (No. 4, Tr. 397), to construe the written document relied upon by petitioner and to instruct the jury that petitioner had no right to rely upon the last paragraph of Wood's letter as a representation that lands within the City of Longview were subject to no bond issues other than the Local Improvement Districts bonds.

In *Baker* v. *Mathew*, 137 Ia. 410, 115 N. W. 15, the Supreme Court of Iowa was called upon to consider the refusal of the trial court to give an instruction which would have required the jury to find that the plaintiff had a right to rely and did rely upon the alleged false represenations. The court said at page 19:

> "Moreover, the instruction asked introduced a factor which should not be considered, and that is whether or not the misrepresentations were such as plaintiff had a right to rely upon. By this instruction the matter was left to the jury to determine whether or not plaintiff had a right to rely upon the representations. This is not the law, and the instruction was properly refused for this reason if for no other."

Moreover, as petitioner concedes, the materiality of a representation is a question of law for the Court to decide,*

**Rand* v. *Michaud*, 122 Me. 65, 118 Atl. 893, at 895.
National Bank of Pawnee v. *Hamilton*, 202 Ill. App. 516, at 522-3.
Bower, Actionable Misrepresentation, Art. 31 and Commentary thereon in Sec. 4.
Hembey v. *Cornelius* (Ark.), 31 S. W. (2d) 539, at 540.

as distinguished from the falsity thereof, which is a question for the jury. The Court could not have found something to be material which was never spoken by respondent either in substance or effect, as alleged in petitioner's amended complaint, and which was never relied upon by petitioner as a representation that the lands within the City of Longview were subjected to no bond issues other than the Local Improvement Districts bonds. This wholly fictitious issue as to a representation never made by respondent obviously had no proper place in this case, and the Circuit Court of Appeals was right in finding that the trial court erred in permitting the issue to go to the jury.

VI.

The Circuit Court of Appeals did not decide that petitioner's negligence could be pleaded as a defense to fraudulent representations or affirmative concealment of material facts, nor was its decision based on that principle. The remarks of the Court to which petitioner calls attention were incidental to its discussion of the total failure of the proof to establish fraudulent concealment.

No contention was made by respondent in the court below that petitioner was barred by reason of its own negligence from asserting its claims of false representations and fraudulent concealment. In discussing petitioner's charge that respondent wilfully and intentionally concealed from the petitioner material facts regarding the financial condition of The Long-Bell Lumber Company, respondent properly pointed out that many of these facts were public property, as readily available to petitioner as to respondent, and that these circumstances should be taken into account in considering whether or not the evidence disclosed any affirmative acts of concealment on respondent's part.

It was solely in connection with a discussion of the evidence bearing upon the charge of fraudulent concealment of Long-Bell's financial condition that the Circuit Court of Appeals made the comments in its opinion, excerpts from which are quoted in petitioner's brief (pp. 64-5). The Court referred to the availability of the quarterly financial statements of the Long-Bell Company, published in the leading financial papers and journals, at least three of which were received and read by petitioner, and to the statements contained in the audited report of the Lumber Company for the year ended December 31, 1929, which Hubbell received and read before purchasing any bonds, as indicative of the lack of intention on respondent's part to conceal such facts from petitioner. As the Court, in effect, points out, it is difficult to conceive of Halsey, Stuart & Co. intentionally concealing from one of its best customers facts relating to The Long-Bell Lumber Company which were matters of public knowledge or readily available in the public press.

The remarks of the Court quoted at the top of page 65 of petitioner's brief refer to a claim of fraudulent concealment which petitioner does not allege in its pleadings, which was not submitted to the jury and which is not argued in this Court—that respondent failed to voluntarily disclose to petitioner that when it originally purchased the Improvement Districts bonds in 1925-7 it relied primarily on the guaranty of The Long-Bell Lumber Company and not on the assessed value of the lands in the several districts. The Court of Appeals very properly points out (p. 671) that the literature furnished by respondent to petitioner develops in great detail the circumstances surrounding the founding and development of Longview and certainly evidences no attempt to conceal from petitioner any facts known to respondent regarding the origin or state of development of that city.

It was solely in connection with facts which were readily available to the world or disclosed in data already supplied to petitioner that the court below made the comments complained of—and only to indicate the complete failure of proof of intentional concealment.

The Iowa authorities referred to by petitioner (pp. 66-7) all deal with cases of *affirmative false representations* where the defendant attempted to interpose the defense that if plaintiff had been diligent he would have discovered that the statements were false. Of course, such a contention should not be sustained. The Circuit Court of Appeals does not even intimate, much less decide, that petitioner should not recover for the false representations alleged in its pleading because it could have discovered the facts by reasonable diligence. The court places its decision squarely on the ground that "there is no proof that appellant knew of the falsity of the statements" (Tr. 667) and, as respects the alleged fraudulent concealments, upon the ground that "The only evidence of concealment was that further facts were not voluntarily disclosed. Under these circumstances we think the duty to disclose all its information subsequently did not devolve upon appellant" (Tr. 669).

Petitioner seeks to inject into the decision of the court below a point which was never argued or considered by that court and upon which, as a reading of the whole opinion readily discloses, the court placed no reliance in arriving at its conclusions.

VII.

The judgment of the Circuit Court of Appeals reversing and remanding the cause for a new trial is fully justified not only because the proofs relied upon are insufficient to sustain the action, but also because of the trial court's

errors in the admission of evidence and instructions to the jury and because of the total failure of proof as to the amount, if any, of the petitioner's damages. All of these questions were presented fully to the Circuit Court of Appeals.

The Circuit Court of Appeals, by reason of its finding that petitioner failed to establish the charges of false representations and fraudulent concealments alleged in its complaint, did not find it necessary to pass on the numerous errors in the admissions of evidence and instructions to the jury, and the failure of proof as to the amount of damages, to all of which the attention of that court was directed by the briefs of both parties.* This Court has repeatedly said that a party in whose favor a judgment or decree was rendered below may on appeal urge in support of such judgment or decree any matter appearing in the record, even though such matter was overlooked or ignored by the lower court.** Since, all other questions aside, this cause must, we respectfully submit, be reversed and remanded for the errors referred to above, we feel warranted in presenting these points to this Court in as brief an outline as possible.

A.

Many of the Court's instructions, particularly those on the question of damages, were erroneous and highly prejudicial to respondent.

The Iowa Supreme Court has consistently held that the damages recoverable in an action for deceit are the difference between the actual value of the property at the time of

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*The Circuit Court of Appeals recognizes that all of these questions were before it for decision (Tr. 666).

**U. S. v. *American Ry. Express Co.*, 265 U. S. 425, at p. 435.
Morley Co. v. *Maryland Casualty Co.*, 300 U. S. 185, at p. 191, and cases there cited.

the purchase and the value which it would have had at that time if it had been as represented. We quote from but one of the many Iowa cases announcing this rule.* In *Otte* v. *James,* 200 Ia. 1353, 206 N. W. 613, an action for damages on account of the alleged fraudulent sale of capital stock, the court said (p. 613):

> "We are committed to the rule that the measure of damages for fraud in the sale of property is the difference between the market value of the property as it actually was at the time of the sale and its market value as it would have been if it had been as reprsented. *Stoke* v. *Converse,* 153 Iowa 274, 133 N. W. 709, 38 L. R. A. (N. S.) 465, Ann. Cas. 1913E, 270; *Gray* v. *Sanborn,* 178 Iowa 456, 159 N. W. 1004."

The trial court correctly instructed the jury as to the measure of damages in accordance with the Iowa law and then modified the instruction by appending thereto the statement set forth in the footnote below.**

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*Other cases to the same effect are: *Stoke* v. *Converse,* 153 Ia. 274, 133 N. W. 709, 711; *Kuehl* v. *Parmenter,* 195 Ia. 497, 192 N. W. 429, 431; *Smith* v. *Middle States Utilities Co.,* 224 Ia. 151, 275 N. W. 158, 162.

**"In determining the actual value of said bonds at the time they were acquired by the plaintiff you will take into consideration all of the facts and circumstances as shown by the evidence, including the character of the lands subject to assessment in various local improvement districts, the existence of other liens upon the lands superior to or equal to the lien of said local improvement district assessments, the local conditions then existing at Longview, Washington, so far as shown by the evidence, the true financial condition of The Long-Bell Lumber Company and its subsidiaries and all other facts and circumstances then existing as shown by the evidence.

In determining the fair actual value of said Local Improvement District Bonds at the times plaintiff acquired the bonds, you are entitled to take into consideration subsequent events and developments which were the direct and proximate result of conditions then existing." (Tr. 404)

The first modification was clearly bad in not limiting the jury to a consideration of only those facts and circumstances relating to the value of the bonds at the time they were acquired by the petitioner as was disclosed by the evidence bearing upon the issue of damages. The jury was told that, in determining this value, it could consider "all of the facts and circumstances as shown by the evidence" and "all other facts and circumstances then existing as shown by the evidence", regardless of whether or not that evidence related to the issue of value or to the numerous other issues which were presented by the pleadings and the evidence. The jury was thus invited to speculate as to what the value of the bonds was in 1930 from anything and everything that it heard in the case. This type of instruction has been repeatedly condemned and held to be reversible error.*

The error in the second modification of the instruction was far more damaging and prejudicial than the first. It invited the jury to engage in unlimited speculation as to the value of the bonds in 1930, untrammeled by the evidence. Damages are awarded in an action of deceit to compensate the plaintiff for the loss resulting from the defendant's fraud. The damages to be recovered must always be the natural and proximate result of the acts complained of—the specific misrepresentations alleged and proved. Yet in this case the trial court instructed the jury that it might fix the plaintiff's damages by considering *subsequent events and developments,* which were the direct and proximate result of *conditions* existing in 1930 when the bonds were purchased.

The Court will note that the jury was not limited to a consideration of subsequent events and developments which

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Garvey v. *Chicago Rys. Co.,* 339 Ill. 276, 171 N. E. 271.
Benham v. *Heath,* 77 Ind. App. 91, 133 N. E. 179.
Gallagher v. *Singer Sewing Machine Co.,* 177 Ill. App. 198.

were the direct and proximate result of the claimed misrepresentations, nor was the jury confined to subsequent events and developments or to conditions existing in 1930 *as disclosed by the evidence*. By this sweeping instruction, the jury was left free to draw on its own knowledge of conditions in 1930 and its own interpretation of events and developments which it might think were the direct and proximate result of such conditions.

In 1930 there was in general throughout the country a condition of over-building and over-expansion, excessive inventories, over-production in certain industries, plant extensions beyond the needs of production, and inflation in land values, as a result of which we had a depression of unprecedented severity and duration. This one event and development had more to do with depressing the value of Longview Local Improvement Districts Bonds and the bonds of thousands of other municipalities than any other one development. Yet the jury was given carte blanche to consider even the depression and every other event affecting stock and bond values which resulted from *conditions* existing in 1930.

Almost this identical language was held erroneous by the Supreme Court of Iowa in reversing a tort judgment against the defendants in *Waldman* v. *Sanders Motor Co.*, 214 Ia. 1139, 243 N. W. 555, where the court said (p. 560):

> "Said instruction is also subject to the criticism that the court told the jury that it should take into consideration certain enumerated things and 'any other condition then existing'. The court did not limit this to conditions as shown by the evidence, nor to the allegations of negligence specified in the petition."

In *Smith* v. *Middle States Utilties Co.*, 224 Ia. 151, 275 N. W. 158, which was an action of deceit for damages growing out of the sale to the plaintiff of shares of stock

in defendant company, the court very clearly pointed out (p. 162) that events occurring subsequent to the dates of the purchase of the stock, and specifically that the existence of the depression, were not matters which could properly be submitted to the jury in considering the issue of damages.

There were numerous errors in other instructions which tended to mislead and confuse the jury. We will do no more than call these instructions to the attention of the Court without argument. The second instruction (Tr. 401) states merely abstract principles of law without reference to the facts or pleadings in the instant case. The third instruction (Tr. 401-2) is completely confusing and misleading in that, while attempting to state the essential elements of an action for affirmative fraudulent misrepresentation, it includes an instruction as to liability for failure to disclose, which liability is not recognized by the Iowa courts. The fourth instruction (Tr. 402) purports to instruct the jury with special regard to the testimony of certain witnesses, thus falling within the universal condemnation of the courts. The fifth instruction (Tr. 402-3) is erroneous in that it calls attention to specific evidence and purports to instruct the jury not on a question of law but as to certain facts. The sixth instruction (Tr. 403) is in hopeless and irreconcilable conflict with the eighth instruction (Tr. 403) given by the court, and the seventh instruction (Tr. 403) in effect presents to the jury the issue of negligent misrepresentation, a doctrine not recognized by the Iowa courts.

By reason of the erroneous instructions to the jury, and particularly the unprecedented and prejudicial instruction given on the issue of damages, respondent was deprived of a fair trial in the lower court.

B.

The trial court erred in admitting evidence as to events and happenings long subsequent to 1930, and in no way shown to be the direct or proximate result of the alleged misrepresenations or concealments, for the purpose of establishing the value of Longview Local Improvement Districts Bonds at the time of their purchase in 1930.

It is the law of Iowa, as it is the law generally, that in proving damages in an action for deceit evidence of only such subsequent events and happenings as are the direct and proximate results of the fraud can be submitted to the jury. *Baumchen* v. *Donahoe,* 215 Ia. 512, 242 N. W. 533; see also: *Carlson* v. *Burg,* 137 Minn. 53, 162 N. W. 889.

Moreover, even in those jurisdictions, such as New York, where the courts have sanctioned the admission of evidence as to subsequent events and circumstances as affecting the value of the securities at the time of purchase, the courts have clearly recognized and stated that in no event can such facts be shown *after* the fraud has ceased to operate and to induce the continued holding of the securities; that is, after the discovery of the fraud by the buyer. The simple reason for this limitation is that, after discovery of the fraud, the buyer is under a duty to elect whether to continue to hold the securities or to dispose of them and take his loss. This is clearly pointed out in *O'Hara* v. *Derschug,* 241 App. Div. 513, 272 N. Y. S. 189, at p. 198, where the New York authorities are reviewed. Other cases to the same effect are noted in the footnote.*

**David* v. *Belmont,* 291 Mass. 450, 197 N. E. 83, 85;
Southern Bldg. & Loan Assoc. v. *Wales,* 224 Ala. 40, 138 So. 553, 555;
Southern Bldg. & Loan Assoc. v. *Bryant,* 225 Ala. 527, 144 So. 367, 368;
Danielson v. *Skidmore,* 125 Ark. 572, 189 S. W. 57, 58;
Munson v. *Fishburn,* 183 Cal. 206, 190 Pac. 808;
cf. *Healy* v. *Ginoff* (Mont.), 220 Pac. 539.
Singleton v. *Harriman,* 152 Misc. 323, 272 N. Y. S. 905, 906 (Aff'd 241 App. Div. 857, 271 N. Y. S. 996).
People v. *S. W. Straus & Co.,* 156 Misc. 642, 282 N. Y. S. 972, 980.

In the trial of the instant case, petitioner, over the objection of respondent, was permitted to introduce, for the purpose of establishing damages, a mass of facts and circumstances which not only had no causal connection with the fraud alleged in petitioner's complaint but which related to events occurring long subsequent to the date of the admitted discovery of the alleged fraud, which was the middle of 1931.

We summarize but a part of this incompetent and highly prejudicial evidence.

1. The fact that The Long-Bell Lumber Company made application to the Federal District Court at Kansas City, Missouri, in June, 1934, for reorganization under Section 77B of the Federal Bankruptcy Act (Tr. 134-37).

2. Certified copy of the Plan of Reorganization of The Long-Bell Lumber Company and final decree of the Court entered in the reorganization proceeding in 1935 (Plff's Ex. P-53, Tr. 272).

3. Testimony as to the market value of preferred and capital stock of the reorganized The Long-Bell Lumber Company as of January 4, 1939, and the range of prices for such stock from December 1, 1935, to January 4, 1939, also amount of stock outstanding, par value of shares and dividends in arrears (Tr. 138-41).

4. The institution of a foreclosure action in the Superior Court of Cowlitz County, Washington, by Cowlitz County to foreclose for general taxes on certain lots and parcels of land in the City of Longview and tax deed dated May 10, 1938, covering property sold for general taxes as the result of said foreclosure proceedings and tax roll made up in 1938 purporting to show outstanding Consolidated Diking District as-

sessments against property in the City of Longview (Tr. 264-68, Plff's Exs. P-47, P-49).

5. Large map of Longview showing in red the various parcels sold for general taxes in 1938 (Plff's Ex. P-48, Tr. 246).

6. A list of securities with valuations to be used by Insurance Companies in annual statements as of December 31, 1936, prepared by a committee of the Insurance Commissioners Convention, and testimony as to the value placed by such committee on Longview Local Improvement Districts bonds as of December 31, 1936, and Supplement to 70th Annual Report of the Equitable Life Insurance Company of Iowa for the year 1936, purporting to show the value placed on said bonds by the petitioner in its 1936 report (Plff's Exs. B-50, B-51, Tr. 207-8).

We submit that the admission of such evidence was not only clearly improper and insupportable on any conceivable theory of proving damages in a fraud action but was grossly confusing and misleading to the jury.

C.

There was no evidence before the jury from which it could possibly determine the amount of petitioner's damages, and the trial court erred, therefore, in not directing a verdict for the respondent.

The rule for computing damages in an action for deceit is clearly laid down in the Iowa cases referred to under Point VII A *supra*. The jury was required to find from the evidence two values for the $266,000. principal amount of Longview Improvement Bonds owned by the petitioner at the time of trial—the actual value on the dates of the respective sales in 1930 and the actual value which such

bonds would have had on these same dates if they had been as represented. Their value in 1930 was obviously made up of two elements—the value of the land and buildings subject to assessment to pay the bonds and the value of the Long-Bell guaranty. No evidence whatever was introduced in the record as to the value in 1930 of the lands and buildings in Longview subject to the Improvement Districts assessments. No opinion evidence of experts or others was offered to guide the jury as to what these bonds were actually worth in 1930 or as to what they would have been worth if as represented. No proof was offered as to the value of the Long-Bell guaranty, except the consolidated balance sheet of The Long-Bell Lumber Corporation and subsidiaries as of January 1, 1930, and January 1, 1931. There was no possible way for the jury to have arrived at the difference of $66,750. between the actual value of the principal amount of Longview Improvement Bonds in 1930 and the value of these bonds as represented, except by resorting to guess, conjecture and speculation.

The Iowa courts have laid down the rule, which is after all axiomatic, that in a fraud action the jury cannot be left to conjecture and speculate as to the amount of plaintiff's damages. There must be definite and positive proof as to such amount.

In *Perry Fry Co.* v. *Gould,* 214 Ia. 983, 241 N. W. 666, the defendant by counterclaim asked damages for alleged fraudulent representations as to the condition of a farm which was the subject matter of the suit but offered no proof as to its reasonable market value at the time of the sale nor its value if it had been as represented. The court, after discussing the rule of damages in a deceit action, said (p. 669):

> "There is no evidence in the record as to the fair and reasonable market value of the Wisconsin farm at

the time in question, to wit, February, 1925, nor what it would have been if as represented. For this reason alone, regardless of other matters urged as error relative to the submission of the alleged false and fraudulent representations as to the condition of the farm, the court should not have submitted to the jury the alleged false and fraudulent representations as to the condition of the farm as a basis for setoff against the judgment of the plaintiff. This matter was called to the attention of the court by timely objections and exceptions."

Other cases to the same effect are noted in the footnote.*

The verdict and judgment cannot be reconciled with any facts in this record or tested by any competent proof. The trial court, therefore, clearly erred in not granting respondent's motion for a directed verdict and in denying respondent's motion for a new trial.

CONCLUSION

This case is devoid of substantial merit. Not only was there a complete failure of proof to sustain the charges of false representations and fraudulent concealments alleged in the amended complaint, but the situation of the parties themselves, as well as the conduct of the petitioner after admitted discovery of the alleged frauds, negatives the idea of any intentional wrongdoing on the part of respondent. Petitioner was one of respondent's large and valued customers. It is inconceivable that respondent would make false representations or would fraudulently conceal from this customer facts regarding these bonds, which respondent was itself buying on the open market and

*_Doyle_ v. _Union Bank & Trust Co._, 102 Mont. 563, 59 Pac. (2d) 1171, 1174.
Otte v. _James_, 200 Ia. 1353, 206 N. W. 613.
Harris v. _Shear_, (Tex.), 177 S. W. 136, at 137.
Kinnear v. _Prows_, 81 Utah 135, 16 Pac. (2d) 1094.

selling to the petitioner at a profit of a point or less over its actual cost.

It does not accord with human experience that one who has been defrauded in connection with the sale of a large amount of securities would make no complaint to the seller after discovering fraud. Yet petitioner, after it had admittedly discovered all of the facts in the Summer of 1931, never claimed that respondent had defrauded it. It continued to buy securities from respondent in large amounts, an aggregate of over $2,000,000, until well into 1934. It participated on a most friendly basis with respondent's Vice-President in endeavoring to work out a reorganization of The Long-Bell Lumber Company as it applied to the Improvement Districts bonds, and never once during those extensive negotiations was a charge of fraud ever made. It was not until after The Long-Bell Lumber Company filed its petition for reorganization under Section 77B in June of 1934 that, for the first time, petitioner gave voice to the charge that it had been defrauded, and even then its charges were limited to the alleged misrepresentations in the circular and Wood's letter, and no mention was made of fraudulent concealments. We respectfully submit that a reading of this whole record demonstrates that this is but another of those cases growing out of the depression, where the buyer of securities, when he is ultimately faced with taking a loss, seeks to cast that loss upon the seller by resorting to charges of fraud in the sale.

For the reasons indicated, we believe that the judgment of the Circuit Court of Appeals was right and that that court reached the only conclusion which the facts of this case justify.

Respectfully submitted,

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